

Decision 09-07-018 July 9, 2009

**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)

**DECISION APPROVING PHASE 3 SETTLEMENT OF THE  
CONSUMER PROTECTION AND SAFETY DIVISION  
AND SAN DIEGO GAS & ELECTRIC COMPANY**

**Summary**

This decision grants the joint motion, as amended, by the Consumer Protection and Safety Division and San Diego Gas & Electric Company (SDG&E) for approval of their settlement of Phase 3 of this proceeding. The parties' settlement provides that while SDG&E does not admit to any violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, it acknowledges its failure to fully comply with Rule 8.3 and tenders an apology for imprecision in its communications with decision-makers in connection with certain ex parte meetings held during Phase 2. SDG&E commits to pay a total of \$920,000 in shareholder funds in amounts specified for charitable contributions, reimbursement to the Commission for expenses related to this proceeding, and payment to the State's General Fund. Further, SDG&E commits to develop a professional responsibility class and an ex parte best practices manual, both in consultation with the Commission. This decision finds the settlement, with a minor clarification, to be reasonable in light of the whole record, consistent with

law, and in the public interest. The decision also specifies certain reporting requirements to permit the Commission to monitor compliance. Approval of the settlement fully resolves Phase 3.

### **Background and Procedural History**

On August 1, 2008, the assigned Commissioner issued a revised Scoping Memo and Order to Show Cause (OSC)<sup>1</sup> to establish Phase 3 of this proceeding, stating:

[T]here 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.<sup>2</sup>

The OSC includes, as attachments, a number of declarations from Commission staff as well as letters and other documents, all offered in support of the facts set out in the OSC. The OSC limits participation in Phase 3 to SDG&E and CPSD. The OSC directs SDG&E to respond within 15 days, preliminarily categorizes Phase 3 as adjudicatory, and imposes a ban on all ex parte communications relating to the matters at issue in Phase 3. It also provides:

[T]he declarants, who are the Commissioner advisors and staff and are percipient witnesses in this adjudicatory phase of this proceeding, may not advise the Commissioners on the potential

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<sup>1</sup> *Assigned Commissioner's Revised Scoping Memo and Ruling Regarding Possible Rule 1.1 and Rule 8.3 Violations; Order to Show Cause (OSC)*, August 1, 2008.

<sup>2</sup> *OSC at 7.*

violations of Rules 1.1 or 8.3, but they are not limited in continuing to advise their Commissioners on Phase 1, and 2, the ratesetting phases of this proceeding.<sup>3</sup>

The June ex parte meetings referred to in the OSC occurred on June 10 and 11, 2008. On August 7, 2008, SDG&E filed revised notices of ex parte communication for those meetings.<sup>4</sup> These notices contain two attachments which were not part of the original notices -- an excerpt from SDG&E's reply brief (previously filed and served on May 30, 2008) and a PowerPoint presentation summarizing SDG&E's Phase 1 and 2 positions.

On August 19, 2008, SDG&E filed an answer and motion to dismiss.<sup>5</sup> The answer includes, as attachments, declarations of various SDG&E employees and other documents, including emails and revised notices of ex parte contact. The answer admits that SDG&E violated Rule 8.3<sup>6</sup> of the Commission's Rules of

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<sup>3</sup> *Id.* at 9 (emphasis added).

<sup>4</sup> See for example, *Augmented Notice of Ex Parte Communication*, August 7, 2008 [re: meeting with Advisors Kinoshian and Brown].

<sup>5</sup> SDG&E filed these documents pursuant to the grant of its concurrently filed Motion to file out-of time (i.e., one day late because of technical problems with a computerized document management system).

<sup>6</sup> Rule 8.3, entitled Reporting Ex Parte Communications, provides, in pertinent part:

(a) Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. A "Notice of Ex Parte Communication" (Notice) shall be filed with the Commission's San Francisco Docket Office within three working days of the communication. The Notice shall include the following information:

(1) The date, time, and location of the communication, and whether it was oral, written, or a combination;

*Footnote continued on next page*

Practice and Procedure (Rules) by inadvertently failing to attach two of the four documents that should have been appended to ex parte notices filed after four ex parte meetings held on June 10 and 11, 2008. The answer states that SDG&E did not violate Rule 1.1<sup>7</sup>.

The Commission's Consumer Protection and Safety Division (CPSD) filed a notice of intervention on August 25, 2008 and filed an opposition to SDG&E's answer on September 2, 2008.

On March 6, 2009 the parties filed a joint motion requesting approval of their settlement of Phase 3. The parties Settlement Agreement is Exhibit A to the joint motion. At the request of the assigned Administrative Law Judge (ALJ), on March 20, 2009, the parties filed an amendment to their joint motion which includes an exhibit list showing the exhibit identification they propose.

### **Settlement Agreement Provisions**

The Settlement Agreement between CPSD and SDG&E, included as Attachment 1 to today's decision, begins with a number of recitals. These recitals

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(2) The identities of each decision-maker (or Commissioner's personal advisor) involved, the person initiating the communication, and any persons present during such communication;

(3) A description of the interested person's, but not the decision-maker's (or the Commissioner's personal advisor's), communication and its content, **to which description shall be attached a copy of any written, audiovisual, or other material used for or during the communication.** (Emphasis added.)

<sup>7</sup> Rule 1.1, entitled Ethics, provides:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or 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.

acknowledge the events that led to issuance of the OSC, restate the separate contentions of CPSD and SDG&E that each has offered sufficient documentation to support its position and prevail on the alleged Rule 1.1 and Rule 8.3 violations, and conclude with SDG&E's reassertions that it (1) admits an inadvertent violation of Rule 8.3, which violation was cured promptly after discovery and caused no prejudice to any other party but (2) does not admit any violation of Rule 1.1.<sup>8</sup>

The main provisions of the parties' settlement include these terms:

- Paragraph 1 -- Apology: SDG&E tenders an apology for imprecision in its communications with decision-makers and states:

SDG&E understands the importance of clear and accurate communications with the Commission. Such communications are critical to the integrity of the regulatory process ... SDG&E sincerely regrets that it fell short of its own high standards here ....<sup>9</sup>

- Paragraph 2 -- Payments of \$920,000 in shareholder funds, as follows:
  - \$200,000. SDG&E commits to contribute \$50,000 to 2-1-1 San Diego, a local non-profit that provides multi-lingual information about disaster relief and other services by telephone on a 24-hour basis, and \$150,000 to SDG&E's Neighbor-to-Nighbor Program, which provides assistance of up to \$200 on a customer's bill.
  - \$220,000. SDG&E commits to reimburse the Commission's Energy Division for expenditures related to the allegations in

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<sup>8</sup> Recital E of the Settlement Agreement actually references Rule 1, which is how the ethics rule was known prior to issuance of the Commission's September 2006 revision of its Rules of Practice and Procedure, which renumbered the Rule as Rule 1.1.

<sup>9</sup> Settlement Agreement at 4.

the OSC and Sunrise Powerlink Transmission Project-related expenditures.

- \$500,000. SDG&E commits to pay this amount to the State's General Fund.
- Paragraph 3 – Professional Responsibility Class. SDG&E will develop and sponsor a professional responsibility course, in consultation with CPSD and the Commission's Public Advisor's Office, that focuses on the Commission's Rules, emphasizing Rule 1.1 duties and ex parte rules best practices. The course would be facilitated by a third party.
- Paragraph 4 -- Ex Parte Best Practices Manual. SDG&E will create an ex parte best practices manual in consultation with the Commission's General Counsel's office.
- Paragraph 5 – Compromise. The parties specify that their settlement is not an agreement on disputed facts and law.
- Paragraph 8 – Evidentiary record. The parties specify which documents they seek to have identified and received in evidence.

### **Evaluation of the Settlement Agreement**

The Settlement Agreement is an uncontested "all-party" settlement. The Commission applies two complementary standards to evaluate such agreements. The first standard, set forth in Rule 12.1(d), is applicable to both contested and uncontested agreements; it requires that the "settlement is reasonable in light of the whole record, consistent with law, and in the public interest." The second standard applies to all-party settlements, and requires that all active parties support the proposed settlement, the parties fairly represent all affected interests, no settlement term contravenes statutory provisions or prior Commission

decisions, and settlement documentation provides the Commission with sufficient information to permit it to discharge its future regulatory obligations.<sup>10</sup>

We turn first to the Rule 12.1(d) standard. We address each part of this standard below and after considering the Phase 3 record and prior Commission decisions, we conclude that the Settlement Agreement is in the public interest and should be approved. The Phase 3 record consists of SDG&E's admission that it violated Rule 8.3 and the contested showings on the alleged Rule 1.1 violation. As the parties reached this settlement before the ALJ set hearings, these showings have not been tested in the hearing room, but neither the Commission nor the parties have been obliged to expend the resources such a hearing would entail. Furthermore, while SDG&E does not admit to violating Rule 1.1, in the apology made part of the Settlement Agreement, SDG&E formally acknowledges the critical importance of "clear and accurate communications" for the regulatory process to retain its integrity and recognizes its lobbying efforts "fell short of its own high standards here."<sup>11</sup>

The parties' joint motion stresses that the settlement components constitute a carefully negotiated "package" but also states that the settling parties believe "each of the items is individually supported by the record or the circumstances of this case."<sup>12</sup> SDG&E's apology is important but insufficient alone, we think, given the record here. The Settlement Agreement implicitly recognizes the

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<sup>10</sup> *San Diego Gas & Electric*, 46 CPUC 2d 538 (1992) [partial settlement of SDG&E general rate case issues, supported by all parties, approved on basis of a four-factor test adopted by the decision].

<sup>11</sup> Settlement Agreement, Paragraph 4 at 4-5.

<sup>12</sup> Joint Motion at 5.

seriousness of the Phase 3 allegations and combines the apology with another element – the shareholder payments – in order to provide direct benefit to the Commission (through reimbursement of costs associated with this proceeding), SDG&E’s ratepayers and the San Diego service territory (through charitable contributions)<sup>13</sup> and the State (through the General Fund contribution). Finally, but of no small importance, the Settlement Agreement includes appropriate remedial measures – it requires SDG&E to develop and sponsor a professional responsibility class at shareholder expense and in consultation with CPSD and the Commission’s Public Advisor. The class is to be offered in San Francisco for the benefit of SDG&E’s local employees, Commission staff, and others who practice before the Commission but in addition, is to be offered internally as well – the Settlement Agreement requires all of SDG&E’s Directors and Officers to attend.

The joint motion includes a review of prior Commission decisions concerning alleged Rule 1 (as Rule 1.1 was known prior to September 2006) or ex parte rule violations by energy utilities. These include:

- D.92-03-042<sup>14</sup> – Commission found Southern California Gas Company (SoCalGas) had misrepresented the status of an affiliate arrangement in a filed report, potentially violating Rule 1; no penalties or sanctions were imposed;

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<sup>13</sup> These charitable contributions (1) mitigate economic hardships arising from the payment of utility bills and (2) provide disaster relief assistance. The later is germane to the issues in this case, as various parties to Phases 1 and 2 were concerned about the possibility that certain power line locations might result in fires in the future.

<sup>14</sup> 43 CPUC2d 498.



- D.97-08-055<sup>15</sup> - alleged Rule 1 violation by Pacific Gas and Electric Company (PG&E) for failure to identify or produce information in discovery settled as part of a larger proceeding (the Gas Accord) by stipulation with the Commission's Consumer Services Division (CSD, the predecessor to CPSD), whereby PG&E agreed to pay \$850,000 to the General Fund and ensure certain employees attended at least four hours of an ethics class;
- D.00-09-034 - CSD investigation into SoCalGas' sale of its Montebello Storage Field settled with no admission of Rule 1 violation by SoCalGas and voluntary payment of almost \$3.5 million to General Fund, as well as development of an ethics course focusing on Rule 1;
- D.08-01-021 - Commission found PG&E had violated ex parte rules; no sanctions imposed; PG&E offered apology and committed to undertake ex parte best practices remedial measures.

Given both the Phase 3 record detailed above and the Commission-approved resolution of prior Rule 1.1 matters, we conclude the Settlement Agreement has been carefully crafted to address the allegations of wrongdoing, to offer reasonable amends to the Commission and the public, and to take appropriate steps to prevent a repeat of the problems that occurred here. As such, the Settlement Agreement is reasonable in light of the whole record, consonant with the public interest, and should be approved under Rule 12.1(d).

Our action here is *not* inconsistent with D.08-07-046 and D.09-06-052, where we declined to adopt a general rate proceeding settlement in which SDG&E and the Southern California Gas Company promised to make certain charitable contributions. As noted in D.09-06-052, amounts related to charitable

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<sup>15</sup> 73 CPUC2d 754.

contributions must be excluded from authorized rates. Accordingly, in that ratesetting proceeding we declined to adopt a settlement requiring corporate charitable contributions, noting that the Commission does not, *as part of its ratemaking responsibilities*, interject itself into utility management decisions regarding corporate philanthropy. However, that decision also noted that different public interest considerations apply when considering a settlement in a merger proceeding.<sup>16</sup> Similarly, different considerations apply to charitable contributions included in settlement of an alleged Rule 1.1 violation in a transmission siting case. A Rule 1.1 violation harms the public, not just the utility's ratepayers in their capacity as ratepayers, as it undermines the integrity of the Commission's procedures. Thus, broader issues of public interest are relevant here. Accordingly, it is appropriate to include in a settlement of these alleged violations charitable contributions that serve the broader public interest.

The Settlement Agreement substantially meets the established standard for all-party settlements. SDG&E and CPSD, the settlement proponents, are the only parties to Phase 3 and have had full opportunity to represent their respective interests. Furthermore, in this proceeding CPSD has represented the public interest in maintaining the integrity of the Commission's processes. As discussed, above, the Settlement Agreement is consistent with prior Commission decisions and we are unaware of any conflict with other law. The Settlement Agreement's terms detail SDG&E's payment and remedial obligations and how it is to discharge them. However, in order to provide the Commission with sufficient information to monitor SDG&E's performance under the terms of the

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<sup>16</sup> D.09-06-052, slip op. at 4, n.6.

Settlement Agreement, we will require SDG&E to report to the Commission on the status of its performance, as set forth in the Ordering Paragraphs. We also clarify here that we understand that all of the requirements set forth in the Settlement Agreement's Paragraph 3, entitled "Professional Responsibility Class," shall be met within the one year time frame provided in that paragraph, including, but not limited to, participation in the class by SDG&E's Directors and Officers.

Based on the rationale and clarification above and on the reporting requirements set forth in the Ordering Paragraphs, the parties' joint motion should be granted and the Settlement Agreement should be approved.

### **Identification of Exhibits and Receipt in Evidence**

Prior to the filing of the Settlement Agreement, no exhibits had been marked for identification or received in evidence. The parties ask that specified declarations and other documents be identified and received as the documentary evidence of Phase 3. This request, found in Paragraph 8 of the Settlement Agreement, is further clarified in the amendment to joint motion, which includes, as an attachment, the parties' proposed Exhibit List. The request is reasonable. We will identify the exhibits listed in Attachment 2 to today's decision and receive them as the documentary evidence of Phase 3, upon the effective date of today's decision.

### **Categorization and Need for Hearing**

In Resolution ALJ 176-222, dated August 21, 2008, the Commission approved the OSC's categorization of Phase 3 of this proceeding as adjudicatory. Given our approval of the Settlement Agreement, no Phase 3 hearings are necessary.

### **Comments on Proposed Decision**

The proposed decision of ALJ Vieth in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

### **Assignment of Proceeding**

Dian M. Grueneich is the assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. SDG&E and CPSD have entered into a voluntary settlement to resolve Phase 3 issues.
2. The parties' Settlement Agreement is supported by both of the active parties eligible to participate in Phase 3 of this proceeding.
3. The active parties are fairly reflective of the interests affected by Phase 3 of this proceeding.
4. No term of the parties' Settlement Agreement contravenes prior Commission decisions or other law.
5. The terms of the Settlement Agreement are reasonable given the Phase 3 record and the Commission's resolution of prior Rule 1 matters.
6. The terms of the Settlement Agreement are consonant with the public interest.
7. In order to provide the Commission with sufficient information to monitor SDG&E's performance under the terms of the Settlement Agreement the Commission should require SDG&E to report on the status of its performance.
8. The Settlement Agreement is unopposed.

9. The exhibits listed in Attachment 2 to today's decision are documents the parties request we identify and receive as the evidence of Phase 3.

10. No hearing is necessary on Phase 3 issues.

### **Conclusions of Law**

1. The Settlement Agreement is an uncontested agreement as defined in Rule 12.1(d) and an all-party settlement under *San Diego Gas & Electric*, 46 CPUC 2d 538 (1992). The proposed settlement satisfies the requirements of Rule 12.1(d) and *San Diego Gas & Electric*.

2. All of the provisions set forth in the Settlement Agreement's Paragraph 3, entitled "Professional Responsibility Class," shall be met within one-year of the effective date of today's decision, as Paragraph 3 requires, including, but not limited to, participation in the Professional Responsibility Class by SDG&E's Directors and Officers.

3. The Settlement Agreement, as clarified, is reasonable in light of the whole record, consistent with law, and in the public interest.

4. The exhibits listed in Attachment 2 of today's decision should be identified and received in evidence upon the effective date of today's decision.

5. The parties' motion for adoption of the Settlement Agreement should be granted and the Settlement Agreement should be approved.

6. This decision should be made effective immediately to provide certainty regarding resolution of Phase 3 and to enable SDG&E to implement the Settlement Agreement without delay.

7. Phase 3 of this proceeding should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. The March 6, 2009 *Joint Motion of the Consumer Protection and Safety Division and San Diego Gas & Electric Company for Approval of Settlement Agreement*, as amended by the March 20, 2009 *Amendment to the Joint Motion of the Consumer Protection and Safety Division and San Diego Gas & Electric Company for Approval of Settlement Agreement*, is granted and the Settlement Agreement, appended to today's decision as Attachment 1, is approved.

2. San Diego Gas & Electric Company shall report on the status of its performance under the Settlement Agreement at six month intervals from the effective date of today's decision until all provisions of the Settlement Agreement have been fulfilled. Such status reports shall be verified by an officer of the corporation, filed in this proceeding, and served on the service list. Attendance by San Diego Gas & Electric Company's Directors and Officers at the Professional Responsibility Class provided for in Paragraph 3 of the Settlement Agreement shall be verified by an officer of the corporation and such verification shall be included in a status report.

3. All of the provisions set forth in Paragraph 3 of the Settlement Agreement shall be met within one-year of the effective date of today's decision, including, but not limited to, participation in the Professional Responsibility Class by San Diego Gas & Electric Company's Directors and Officers.

4. The exhibits listed in Attachment 2 of today's decision are identified as indicated therein and are received in evidence on the effective date of today's decision.

5. The parties shall comply with all provisions of the Settlement Agreement referred to in Ordering Paragraph 1.

6. No Phase 3 hearing is necessary.

7. The issues raised by the *Assigned Commissioner's Revised Scoping Memo and Ruling Regarding Possible Rule 1.1 and Rule 8.3 Violations, Order to Show Cause*, August 1, 2008, have been timely addressed and Phase 3 of this proceeding is resolved for purposes of compliance with Public Utilities Code Section 1701.5(a).

8. Phase 3 of this proceeding is closed.

9. Application 06-08-010 remains open solely to address matters pending in Phases 1 and 2 after issuance of Decision 08-12-058.

This order is effective today.

Dated July 9, 2009, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners