Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Alliance for Utility Safety and Education, Complainant, vs. San Diego Gas and Electric Company and the City of San Diego, Defendants.	Case 04-12-012 (Filed December 20, 2004)

Harold Tyvoll, for California Alliance for Utility Safety and Education, complainant.
Kelly M. Morton, San Diego Gas & Electric Company, for San Diego Gas & Electric Company, defendant.

OPINION DISMISSING COMPLAINT

1. Summary

We find that, in planning and constructing the 30th Street 138 kilovolt (kV) underground conversion project in San Diego (Undergrounding Project), defendant San Diego Gas & Electric Company (SDG&E) did not comply with the mandates of the California Environmental Quality Act (CEQA), Pub. Res. Code § 21000 *et seq.,* and General Order (GO) 131-B. Since the Undergrounding Project has already been built, however, we will not now require SDG&E to take any remedial steps with respect to the requirements of GO 131-D or CEQA for the

Undergrounding Project. We also find that SDG&E complied with the requirements of Decision (D.) 93-11-013 regarding no-cost and low-cost measures to mitigate the impact of electromagnetic fields (EMF) in its construction of the Undergrounding Project.

2. Procedural Background

Complainant California Alliance for Utility Safety and Education (CAUSE) filed its complaint on December 20, 2004 and filed an amended complaint on February 14, 2005. The original defendants, San Diego Gas & Electric Company (SDG&E) and the City of San Diego (City), filed their answers to the original complaint and amended complaint on February 17, 2005. The City also filed a motion to dismiss the complaint as to it on February 17, 2005. This motion was granted by an Administrative Law Judge (ALJ's) Ruling Granting Motion to Dismiss on April 6, 2005.[1] A prehearing conference (PHC) was held in San Diego on March 22, 2005.[2] The Scoping Memo and Ruling of Assigned Commissioner (April 25, 2005) confirmed the preliminary determination that this is an adjudicatory matter; an evidentiary hearing was also required. The evidentiary hearing was held in San Diego on August 2, 2005. The parties filed closing briefs on August 25, 2005 and reply briefs on September 2, 2005. This matter was submitted on September 2, 2005.

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[1] We now confirm this ruling.

[2] On April 1, 2005, SDG&E filed a Supplement to its answer, attaching a document requested by the ALJ at the PHC.

3. Statement of Facts

3.1 Overview of the Undergrounding Project

The City has a program authorizing the designation of particular areas for the removal of poles and overhead wires that the City has determined would be better undergrounded.[3] All parties agree that the typical reason for such undergrounding is aesthetics. A 1995 agreement between SDG&E and the City is the basis for this program. The City annually reviews and proposes for funding particular underground projects.[4] The City created the "30th Street (University Avenue to Olive Street) Underground Utility District" (Underground District) by Resolution R-293141 (May 16, 2000), to allow the relocation underground of a portion of a 138 kV transmission line running overhead along 30th Street. The plan of the Underground District attached to R-293141 is reproduced as Appendix A to this decision. The City found that the formation of the Underground District was exempt from CEQA pursuant to CEQA Guidelines Section 15302(d).[5]

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[3] San Diego Municipal Code § 61.0508. *See* also SDG&E Tariff Rule 20 (July 25, 2002).

[4] The City approved the allocation of funds for 30th Street undergrounding from University Avenue to National Street in Resolution R-292225, dated September 27, 1999.

[5] Section 15302 provides that a project will be exempt from CEQA if the project

> . . . consists of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to: . . .
>
> (d) Conversion of overhead electric utility distribution system facilities to underground including connection to existing overhead electric utility distribution lines where the surface is restored to the condition existing prior to the undergrounding.

The CEQA Guidelines are found at 14 Cal. Code Reg., sec. 15000 *et seq*.

In September 2000, SDG&E sent a letter informing City staff that SDG&E was changing the undergrounding route shown in Appendix A. Instead of proceeding along 30th Street, a predominantly commercial street where the overhead line ran, the undergrounding would proceed under 29th Street and Dale Street, in a primarily residential area. The new route, SDG&E stated, had more space available for the underground conduit and would be less disruptive to traffic and businesses in the area. This route is reproduced as Appendix B to this decision.[6]

SDG&E began construction of the Undergrounding Project, approximately 1.4 miles in length, in August 2001 and placed the line into service in April 2002.[7] The poles for the previous overhead line along 30th Street were removed by mid-March 2004. Additional undergrounding of the overhead line now along 30th Street is planned. What is referred to as "Phase 2" will continue the undergrounding farther south. The projected route for Phase 2 is attached as Appendix C to this decision.[8] Future phases are possible, but plans for them have not yet been developed.

3.2 Construction

The Undergrounding Project consists of the conversion of a portion of an existing overhead 138 kV transmission line that runs north to south through the Golden Hill and North Park areas of San Diego. The underground

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[6] Provided as Attachment A to the Testimony of William V. Torre (July 20, 2005) (Torre Testimony).

[7] Because this complaint was filed within three years of the construction of the Undergrounding Project, it is timely.

[8] Provided as Attachment B to Torre Testimony.

installation consists of SDG&E's standard double circuit duct bank. This has six, 6-inch conduits placed in two vertical columns. The center four-inch conduit is used for SDG&E's telecommunications system; the two outer columns of conduits, consisting of six conduits, are for high voltage electric cable. Three of these conduits in one column are in use for the electric cables required for the current Undergrounding Project; the vacant ducts in the other column may be used for a future circuit.

3.3 EMF Measurements

Residents in the area of the Undergrounding Project, concerned about possible EMF emissions from the transmission line installed under 29th Street and adjoining streets, have both taken EMF readings themselves and asked SDG&E to send a representative to take readings. Using a gauss meter (the accepted tool for EMF measurement), residents have taken a variety of measurements of EMF levels in the vicinity of the undergrounded line. The average of all the measurements taken 50 feet from the location of the line is between five and six milligauss (MG), with peaks above 10 MG. In one visit to a home on Dale Street with a 50-foot setback from the trench for the underground line, SDG&E personnel obtained readings of approximately 9.5 MG at the front door, with an average indoor level of 7.5 MG. At the request of residents, SDG&E also made measurements at other homes and outdoor locations. Neither CAUSE nor SDG&E was able to quantify the proportion of detected EMF emissions that are a result of the Undergrounding Project. Based on information provided in limited existing studies, average exposures of 7.5 MG are higher than those experienced by most people in the United States.

4. Discussion

4.1 CEQA

CAUSE asserts that the change in the location of the undergrounding from the Underground District to the 29th Street and Dale Street route rendered the project ineligible for exemption from the requirements of CEQA, under Guidelines section 15302(d). CAUSE also asserts that the entire enterprise of undergrounding the 30th Street overhead 138 kV transmission line has been improperly divided into phases, and should be considered as one project for CEQA purposes.

SDG&E responds that the project remains eligible for the CEQA exemption, regardless of where it is located and how it is phased. SDG&E relies on *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827 to argue that the location of the undergrounding a block or more away from the overhead line is still encompassed within the CEQA "same site" exemption.[9]

We do not have the benefit of any determination by the City, as lead agency, on this issue. SDG&E notified City personnel of its change to the route, but the City did not amend Resolution R-293141 to reflect the change. Nor, apparently, did the City consider whether the CEQA "same site" exemption was still applicable to the re-routed project.

SDG&E's reliance on *Dehne* is nevertheless misplaced. In that case, a large cement facility was proposing to replace existing buildings with other structures on the same facility site, on the same piece of property, owned by the

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[9] SDG&E also cites *Better Government v. City of Palos Verdes Estates*, 2002 Cal.App.Unpub. LEXIS 9349. Although we are not bound by the California Rules of Court, with Rule 977 prohibiting reliance on unpublished cases, we decline to consider this case.

same owner, as the buildings to be replaced. The court found that the requirements of then-section 15102 of the Guidelines,[10] that "the new structure will be located on the same site as the structure replaced," were satisfied when the facility was "reconstructed within the area bounded by the existing plant." 115 Cal.App.3d at 838. We applied this principle in D.00-07-044, which allowed the relocation of a 60 kV line 100 feet away from the original location, on the same farm. Our conclusion that the power line relocation was exempt under Guidelines § 15302 is consistent with that of the *Dehne* court, which interpreted "same site" to mean the boundaries of the property in which the existing cement facility was located.

By contrast, SDG&E built the Undergrounding Project on streets that did not have any of the overhead line that was being replaced. These streets are also outside the boundaries of the Underground District adopted by the City for the purpose of undergrounding the 30th Street overhead transmission line. The court in *Dehne* clearly stated that "[t]he exemption category does not permit applicants to move the site." 115 Cal.App.3d at 838. In the Undergrounding Project, SDG&E did "move the site," from the original route of the overhead line and boundaries of the Underground District to a different set of city streets, and thus is not able to benefit from the exemption.[11]

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[10] Now section 15302.

[11] We note also that Guidelines § 15302 (d) addresses "[c]onversion of overhead electric utility *distribution* system facilities to underground including connection to existing overhead electric utility *distribution* lines. . ." (emphasis added). Section I of GO 131-D defines a distribution line as a line intended to operate at 50 kV or less. It thus appears that the range of projects exempted by Guidelines § 15302(d) is narrower than the range of projects covered by GO 131-D.

CAUSE also claims that the undergrounding of the 30th Street overhead line has been improperly phased or segmented. For CEQA purposes, a government agency must consider the "whole of an action,"[12] which CAUSE asserts is the underground conversion of the entire overhead line. SDG&E responds that the linear segments of the overhead line can be separately undergrounded, as demonstrated by the work giving rise to the complaint, and thus can be considered separate projects for CEQA purposes. The phasing determination is made, in the first instance, by the City as lead agency.[13] Our record in this proceeding is not complete on the issues of phasing, since the City was dismissed as a party and we lack information about its process for setting phases for undergrounding. We therefore cannot conclude that any improper segmentation occurred with respect to the Undergrounding Project.

Our conclusion that the exemption found in Guidelines § 15302(d) does not apply to the Undergrounding Project does not end our inquiry. We must also decide what remedy, if any, to apply. The City is the CEQA lead agency for the Undergrounding Project. Even if we view the City's determination of exemption as erroneous, our remedial actions are limited both by Guidelines § 15052[14] and by practical considerations. As we noted in D.04-07-023, where the Commission was the lead agency,

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[12] Guidelines section 15378(a).

[13] The lead agency concept is explained and rules for determining lead and responsible agencies are set out in Guidelines §§ 15050-15052.

[14] Guidelines section 15052 provides:

(a) Where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, the

Footnote continued on next page

> CEQA requires an environmental review to occur before an activity takes place. Here, all of the activities. . . have already occurred. Consequently, conducting a CEQA review at this time would serve no practical purpose. *Mimeo*., at p. 17.

When we are the responsible agency, as we are for the Undergrounding Project, the reasons not to conduct an after-the-fact CEQA review—even if the requirements of Guidelines § 15052 were met—are all the stronger. We therefore decline to require any further action under CEQA for the Undergrounding Project. We note, however, that any further phases of the 30th Street undergrounding effort must be conducted in accordance with the appropriate CEQA requirements.

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responsible agency shall assume the role of the lead agency when any of the following conditions occur:

(1) The lead agency did not prepare any environmental documents for the project, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.

(2) The lead agency prepared environmental documents for the project, but the following conditions occur:

(A) A subsequent EIR is required pursuant to Section 15162,
(B) The lead agency has granted a final approval for the project, and
(C) The statute of limitations for challenging the lead agency's action under CEQA has expired.

(3) The lead agency prepared inadequate environmental documents without consulting with the responsible agency as required by Sections 15072 or 15082, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.

(b) When a responsible agency assumes the duties of a lead agency under this section, the time limits applicable to a lead agency shall apply to the actions of the agency assuming the lead agency duties.

4.2 GO 131-D

CAUSE claims that SDG&E failed to comply with both the permit to construct (section IX.B.)[15] and public notice (section XI.A)[16] provisions of GO 131-D. SDG&E responds that the project, being exempt from CEQA, is not subject to the notice requirements of GO 131-D; even if it were, the project has no adverse environmental impacts. SDG&E relies on § III.B.1.d of GO 131-D, which provides that "[c]ompliance with Section IX.B is not required for. . . the conversion of existing overhead lines to underground."[17] If the Undergrounding Project is exempt from the PTC requirement pursuant to § III.B.1, then it is also exempt from the notice requirements of § XI.A and subject only to the notice requirements of § XI.B.

When we adopted the PTC process in D.94-06-014, we noted that "[n]o permit to construct is required for projects that are exempt from CEQA."

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[15] Section IX.B., titled "Power Line Facilities Between 50 kV and 200 kV and Substations Designed to Operate Over 50 kV Which Are Not Included in Subsection A of this Section," provides in relevant part:

> Unless exempt as specified in Section III herein, or already included in an application before this Commission for a CPCN, an electric public utility desiring to build power line or substation facilities in this state for immediate or eventual operation between 5 0 kV and 2 00 kV or substations for immediate or eventual operation over 50 kV, shall file for a permit to construct not less than nine (9) months prior to the date of a required decision by the Commission unless the Commission authorizes a shorter period because of exceptional circumstances.

[16] Section XI.A, applicable to applications for a certificate of public convenience and necessity and to projects requiring a PTC, contains more extensive and more individualized notice requirements than Sec. XI.B.

[17] A second possible exemption, "the minor relocation of existing power line facilities up to 2,000 feet in length. . .," found in Sec. IX.B.1.c, is inapplicable to the Undergrounding Project, which is more than a mile in length.

(55 CPUC 2d 87, 103.) We also made clear that the determination of exemption from the PTC requirement was based on the determination that the project was exempt from CEQA. Since, as explained above, the Undergrounding Project was not properly exempt from CEQA, it was not exempt from the PTC requirements and associated notice requirements of GO 131-D.

As with our analysis of remedies available for the CEQA violation, however, we conclude that no useful purpose would be served by requiring SDG&E to pursue a PTC and give notice under Sec. XI.A several years after the Undergrounding Project was completed. We expect SDG&E to comply with the PTC requirements, when applicable, in future underground conversion work.

4.3 EMF

Finally, CAUSE alleges that SDG&E failed to take appropriate steps to mitigate EMF emissions in the Undergrounding Project.[18] SDG&E defends the steps it has taken to mitigate EMFs. It argues that it has met its obligations under D.93-11-013 by following the procedures in its *EMF Design Guidelines for Transmission, Distribution, and Substation Facilities* (May 23, 1994) (EMF Design Guidelines) and that, both legally and factually, it cannot be required to do more.

Although the parties did not focus on this issue, we first must decide whether we have jurisdiction over the EMF portion of the CAUSE complaint. Our complaint procedure is limited by Pub. Util. Code § 1702 to "any act or thing done or omitted to be done by any public utility. . . , in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." With respect to EMFs, CAUSE makes two claims. The first is that SDG&E did

[18] CAUSE also alleged that SDG&E failed to use appropriate shielding for the underground cable as required by GO 128, but abandoned that claim at the PHC.

not adhere to its EMF Design Guidelines. The second is that, regardless of whether SDG&E complied with the EMF Design Guidelines, the level of EMF exposure in the vicinity of the Undergrounding Project is dangerous and should be abated.

In D.93-11-013, we concluded that the scientific information on the effects of EMF exposure was sufficiently uncertain that we would not set any EMF standards, but would require the utilities to implement EMF mitigation measures that are no-cost or low-cost (with a benchmark of four per cent of the project cost) for each project. We also required the utilities to develop, distribute, and implement EMF design guidelines to carry out the EMF policy announced in the decision. SDG&E's EMF Design Guidelines are the result of the process set forth in D.93-11-013.[19]

CAUSE's claim that SDG&E has failed to adhere to its EMF Design Guidelines is therefore within the scope of our jurisdiction, as it is a claim that SDG&E has failed to comply with D.93-11-013, which established the EMF design guidelines requirement. The claim that EMF exposure in the vicinity of the Undergrounding Project is too high, however, is outside the scope of § 1702. We have established no standards for EMF exposure and none have been established by any other California agency. Therefore, CAUSE cannot show that

[19] In D.06-01-042, which concluded our review of EMF policies undertaken in R.04-08-020, we instructed the utilities to continue using design guidelines for EMF mitigation purposes and to convene a workshop to develop improvements to their existing guidelines. Nothing in that decision affects the outcome of this complaint proceeding.

any particular level of EMF exposure is in violation of "any provision of law or of any order or rule of the commission," as required by § 1702.[20]

SDG&E demonstrated through the testimony of William V. Torre, the lead design engineer on the Undergrounding Project, that it complied with its EMF Design Guidelines in the design and construction of the Undergrounding Project. Torre explained that the EMF Design Guidelines specify that a "noticeable reduction" of EMF intensity must be achieved in order for "low-cost" expenditures to be made. SDG&E's EMF Guidelines define "noticeable reduction" as being greater than or equal to 15%, after applying no-cost measures. Torre used computer simulation models to calculate that in order to have achieved a 15% reduction of EMF fields beyond the "no-cost" field reductions at the nearest property line, three additional trench depths of 2.25 - 5 feet (about 7.25 - 11 feet to the top of the duct package) would have been necessary. The additional cost of such trenching would have been more than 19% of the totaled budgeted cost for the Undergrounding Project, well beyond the benchmark of 4%.

CAUSE focused its efforts on attempting to demonstrate that the modeling used by SDG&E did not accurately predict post-construction EMF exposure, and that the construction methods used by SDG&E did not result in

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[20] This conclusion also leads us to deny the request made by CAUSE to take official notice under Rule 73 of our Rules of Practice and Procedure of the California Department of Health Services report, "An Evaluation of the Possible Risks from Electric and Magnetic Fields (EMFs) from Power Lines, Internal Wiring, Electrical Occupations, and Appliances" (June 2002) (DHS EMF Report). We also will not consider CAUSE's request that we decide whether or how our decision in D.04-08-046 on EMF mitigation measures in Pacific Gas and Electric Company's Jefferson-Martin project should be applied to the construction of the Undergrounding Project.

actual mitigation of EMF exposure at the levels predicted by the modeling. These issues, while potentially important, are outside our jurisdiction over this complaint. We therefore do not address them. On the issue that is within our jurisdiction—SDG&E's compliance with its EMF Design Guidelines—CAUSE did not demonstrate that SDG&E failed to follow the EMF Design Guidelines.

5. Appeal

The Presiding Officer's Decision (POD) was mailed December 12, 2005. CAUSE filed an appeal on December 30, 2005. SDG&E filed a response to the appeal on January 17, 2006.

In its appeal, CAUSE reiterates its claims that we are required to take official notice of the DHS EMF Report and to consider D.04-08-046 in this complaint proceeding. As noted in the POD, we are not required to take into consideration material that is not relevant to the issues to be decided. CAUSE did not demonstrate that relevance prior to issuance of the POD and has not shown it in the appeal.[21]

CAUSE also reargues its contention that SDG&E did not comply with the no-cost/low-cost EMF mitigation requirements of D.93-11-013. This claim is not supported by the record, which includes not only the prepared testimony on which CAUSE appears to rely, but also the clarifications and additional information developed through cross-examination at the EH.

Finally, CAUSE repeats its claim that the undergrounding of the southern portion of the 30th Street overhead transmission line is one project that has been

[21] CAUSE also misinterprets Rule 73 as requiring this Commission to follow the same procedures for taking official notice as those set forth in § 453 of the Code of Civil Procedure with respect to judicial notice in the California courts.

improperly segmented for CEQA purposes. As the POD notes, we simply cannot determine whether this claim is accurate, because the record does not reveal the processes of the lead agency – the City – with respect to determining the difference between a properly phased project and an improperly segmented project.

We therefore make no substantive changes to the POD, but update the footnote referring to R.04-08-020.

6. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner. Anne E. Simon is the assigned Administrative Law Judge.

Findings of Fact

1. The City authorized the creation of the Underground District by Resolution R-293141, adopted on May 16, 2000, for the purpose of allowing the 138 kV transmission line running overhead along 30th Street to be placed underground.

2. The City determined that the Underground District was exempt from the requirements of CEQA.

3. The initial undergrounding work for the 30th Street 138 kV overheard line was planned for the route set out in Appendix A hereto.

4. In September 2000, SDG&E notified the City that the route was changed to the route set out in Appendix B hereto.

5. The route chosen by SDG&E was outside the boundaries of the Underground District established by the City.

6. Construction on the Undergrounding Project, using the new route, began in August 2001; the new underground line was placed into service in April 2002.

7. SDG&E undertook the construction of the Undergrounding Project without seeking a permit to construct (PTC) pursuant to GO 131-D.

8. SDG&E did not provide the notice of the construction of the Undergrounding Project required by GO 131-D, § IX.A.

9. The Undergrounding Project was planned and constructed in accordance with the procedures set out in SDG&E's *EMF Design Guidelines for Transmission, Distribution, and Substation Facilities* (May 23, 1994).

10. Additional undergrounding of the overhead 138 kV transmission line running along 30th Street is planned.

Conclusions of Law

1. The Administrative Law Judge's Ruling Granting Motion to Dismiss, dated April 6, 2005, and responding to the City's motion, should be confirmed.

2. The Undergrounding Project does not comply with the requirements of CEQA, in that it was constructed without CEQA review although it did not meet the requirements for exemption under section 15302 of the CEQA Guidelines.

3. The notice requirements of GO 131-D, § XI.A applied to the Undergrounding Project.

4. The Undergrounding Project did not comply with the requirements of GO 131-D.

5. The Undergrounding Project did not comply with the requirements of GO 131-D.

6. Because the Undergrounding Project has been completed and is in operation, SDG&E should not now be required to comply with the applicable CEQA requirements.

7. Because the Undergrounding Project has been completed and is in operation, SDG&E should not now be required to seek a PTC or comply with the GO 131-D, § XI.A notice requirements.

8. SDG&E complied with the requirements of D.93-11-013 in construction of the Undergrounding Project.

9. SDG&E should not be required to make any alterations to the existing work done for the Undergrounding Project to attempt to reduce EMF emissions.

10. In order to resolve any uncertainty about the status of the Undergrounding Project, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The Administrative Law Judge's Ruling Granting Motion to Dismiss, dated April 6, 2005, and dismissing the complaint as to the City of San Diego, is confirmed.

2. Case 04-12-012 is dismissed.

3. Case 04-12-012 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A B C of SImon C0412012