Decision **DRAFT DECISION OF ALJ ALLEN** (Mailed 4/25/2006)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SAN DIEGO GAS & ELECTRIC COMPANY for Authority Pursuant to Public Utilities Code Section 851 to Sell Certain Property in Its Transmission Corridor in the City of San Juan Capistrano in the County of Orange to Whispering Hills, LLC, to Realign Transmission and Distribution Lines Overhead on a Temporary Basis and Underground on a Permanent Basis and to Enter into Easements with Whispering Hills, LLC. (U 902-E)	Application 04-07-049 (Filed July 30, 2004)

OPINION GRANTING APPLICATION OF SAN DIEGO GAS & ELECTRIC COMPANY

Summary

We approve the proposal of San Diego Gas & Electric Company (SDG&E) to sell 13.8 acres of land in San Juan Capistrano to Whispering Hills, LLC (Whispering Hills) in exchange for easements and $1,249,195. At the previously proposed sale price of $287,967, SDG&E ratepayers and shareholders would have been paying for part of the cost of relocating existing utility facilities for the benefit of Whispering Hills.

Since Whispering Hills and SDG&E have agreed to increase the sale price by $961,228 to properly allocate the cost of removing the existing power lines, for a total sale price of $1,249,195, that has removed the ratepayer and shareholder subsidization of Whispering Hills, and we approve the sale.

The Property

Whispering Hills is building Whispering Hills Estates, a 356-acre development consisting of a gated planned community of 155 single family homes and a high school site, located in the southeastern portion of the City of San Juan Capistrano (City). SDG&E owns land in a transmission corridor that bisects the proposed development. SDG&E power lines (138 kV and 12 kV) are located on the transmission corridor. According to SDG&E, Whispering Hills needs to have the power lines relocated to accommodate its development by providing room for building homes and the high school.

In order to accommodate the needs of Whispering Hills, SDG&E proposes to temporarily relocate its power lines, allowing Whispering Hills to grade a street.[1] After the street is graded, SDG&E's lines would then be relocated to a permanent location, in part undergrounded in the new street.

In addition to the physical relocation of the power lines, SDG&E proposes to sell approximately 14 acres of land to Whispering Hills, and receive back from Whispering Hills easements for access to its power lines.[2]

Before us today is the proposed sale of SDG&E land to Whispering Hills. In exchange for the land, SDG&E would receive easements for its power lines, plus a monetary payment of $1,249,195 that would flow to both ratepayers and shareholders pursuant to D.05-04-007. Whispering Hills is to pay the entire cost of relocating SDG&E's transmission and distribution lines.

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[1] We granted the request to allow grading in D.05-04-007.

[2] A map is attached as Attachment A. (From SDG&E's 9/2/05 Motion, Tab 2.) While the record has some minor variations in the numbers, the attached map shows SDG&E selling 13.82 acres of land and receiving 13.52 acres in easements.

Procedural Background

July 30, 2004. SDG&E files this application with the California Public Utilities Commission (CPUC), seeking approval for the transaction described above, as required by Public Utilities Code Section 851.[3] Accompanying the application is a motion, requesting expedited approval of the application, and requesting expedited authorization to permit grading pending approval of the application. The application included a 2001 appraisal prepared for Whispering Hills, which provided the basis for the proposed sale price of $100,000.

SDG&E's application did not include the Environmental Impact Report (EIR) prepared by the City, and the application and motion were served only on SDG&E, Sempra, and Whispering Hills.

August 20, 2004. Commissioner Geoffrey F. Brown and Administrative Law Judge (ALJ) Peter V. Allen are assigned to the proceeding.

October 14, 2004. The ALJ issues a ruling requesting SDG&E to file the EIR with the Commission, in order for the Commission to satisfy its obligation as a responsible agency under the California Environmental Quality Act, and requiring SDG&E to more broadly serve its application on potentially interested parties.

October 22, 2004. SDG&E provides the City's EIR and proof of additional service.

November 16, 2004. The Commission receives a letter from the Capistrano Unified School District in support of SDG&E's application.

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[3] On February 17, 2004, SDG&E submitted Advice Letter 1566-E to the CPUC, providing notice of the proposed relocation of transmission lines to accommodate the Whispering Hills project. The advice letter became effective March 28, 2004.

November 19 and 20, 2004. The Commission receives three letters from individual citizens arguing that the proposed $100,000 sale price for the 14-acre property is significantly too low. Specifically, the letters argued that the 2001 appraisal used to set the price was based upon outdated zoning that was more restrictive than the current zoning, and failed to consider the most recent comparable land sale, which was the sale of land to the local high school district for approximately $1 million per acre.[4]

December 1, 2004. The ALJ issues a ruling providing SDG&E and other parties an opportunity to respond to the allegations in the three letters.

December 10, 2004. SDG&E, Whispering Hills, the Commission's Office of Ratepayer Advocates (ORA), and local residents Anne Fox, Mark Nielsen, and Mike Mathewson submit comments.

SDG&E submitted a short pleading, with an attached Declaration of James Seifert, SDG&E's Manager of Corporate Real Estate. Mr. Seifert described the negotiation process between SDG&E and Whispering Hills,[5] and defended the adequacy of the 2001 appraisal and the proposed $100,000 sale price.[6]

Whispering Hills detailed the various encumbrances on the site, pointed out the significant sums of money spent by Whispering Hills on the project as a

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[4] For a 52-acre parcel.

[5] According to Mr. Seifert, "[T]he Developer [Whispering Hills] initially approached SDG&E in early 1998." However, "No substantive progress was made toward any negotiations between the Developer and SDG&E until December of 2001 when the Developer delivered the appraisal that is included in the pending application."

[6] According to Mr. Seifert, the appraisal valued the property at $82,320, but the price was increased 21% to $100,000 to account for the increased value of the property due to the passage of time since the date of the appraisal.

whole, and emphasized that the acreage of the easements to be received by SDG&E was almost the same as the acreage of land to be received by Whispering Hills. Whispering Hills also noted that SDG&E was selling the land to Whispering Hills in an "as is" condition, not a graded pad like the high school site, so comparisons with that land sale are mixing "apples and oranges." (Whispering Hills Comments, p. 6.)

Mr. Mathewson submitted a portion of a 2003 Purchase and Sale Agreement between Whispering Hills and the Capistrano Unified School District. According to the Agreement, Whispering Hills contracted to sell to the School District 0.95 acres of the land Whispering Hills acquired from SDG&E for $965,000. As characterized by Mr. Mathewson, the Agreement shows that a portion of the land purchased from SDG&E for approximately $7,000 per acre will be immediately re-sold for approximately $1,000,000 per acre.

Ms. Fox argued that the value of land at issue in the application is closer to $1 million per acre, as shown by the resale of the 0.95 acre parcel. In addition, according to Ms. Fox, absent relocation of the power lines Whispering Hills would lose roughly 15 single family detached lots, which has very significant value to Whispering Hills, and should be reflected in the sale price. (Fox Comments, p. 2.)

Mr. Nielsen generally concurred with Mr. Mathewson and Ms. Fox, but additionally noted that the City of San Juan Capistrano has set the average per-acre value for calculating in-lieu parks and recreation fees for developers at

$725,000.[7] In addition, Mr. Nielsen argued that "[T]here is no evidence to suggest that the differential between graded and non-graded land in Orange County is anywhere near 99% for the grading and only 1% of the value for the underlying land." (Nielsen Comments, pp. 3-4.)

ORA observed that SDG&E's application "may have left out, or alternatively, given incomplete information, about this transaction." (ORA Comments, p. 1.)

SDG&E, ORA, and Mr. Nielsen expressed a desire to submit additional information to the Commission.

December 16, 2004. The ALJ issues a ruling allowing for a second round of comments.

January 7, 2005. SDG&E, Whispering Hills, ORA, and Mr. Nielsen submit second-round comments.

SDG&E denied that the sale to Whispering Hills is a "sweetheart deal," and argued that the local citizens' criticisms are comparing apples and oranges, because the value of the land that Whispering Hills would resell to the School District is based on the School District receiving "a developed , unencumbered graded pad site," while the transaction at issue in the application is for "an encumbered utility easement of raw land." (SDG&E Reply Comments, p. 3.)

Similarly, Whispering Hills points out that it is spending over $62 million to grade the project area and to provide infrastructure and access, and another $10 million for entitlement and mitigation purposes. Whispering Hills

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[7] He also notes that the per-acre price paid by Whispering Hills for approximately 350 acres of adjacent land 10 years ago was higher than the price being proposed in this application, but he does not state what that price was.

acknowledges that the value of the high school site is over $1 million per acre, but notes that that value is based on the assumptions that the land is clear of liens and encumbrances and is in a finished, mass graded condition with all infrastructure of streets, utilities, and storm drains completed to the site. (Whispering Hills Reply Comments, pp. 3-4.)

Mr. Nielsen reiterated his criticisms of the 2001 appraisal, arguing that the comparable properties it used were distant and outside city limits, while ignoring much closer and recent comparable transactions. Mr. Nielsen, based in part on the sale of 0.95 acres for $965,000 discussed above, argued that the value of the property should be between $500,000 and $1 million per acre, taking into consideration any grading to be performed by Whispering Hills. (Nielsen, Reply Comments, pp. 1-3.)

ORA expressed a desire for more information, stating that legitimate concerns had been raised about the appraisal and marketing of the property. (ORA Reply Comments, p. 2.)

January 24, 2005. Ms. Fox submitted late-filed comments, primarily addressing the relevance of zoning to the value of the land, but also arguing that the fair market value of the land (based on the 2003 contract between Whispering Hills and the School District for the 0.95 acres of land), considering grading and other improvements, should be a minimum of $430,000 per acre. (Fox Reply Comments, p. 2.)

February 3, 2005. SDG&E submits a motion, seeking leave to file its attached response to ORA's second-round comments, providing additional background information and analysis requested by ORA.

February 9, 2005. The ALJ grants SDG&E's motion to allow its response to ORA's comments.

March 8, 2005. The ALJ issues a draft decision, allowing Whispering Hills to grade the property, but finding that the record did not support a determination that the proposed $100,000 sale price was adequate, and directing SDG&E to enter further negotiations with Whispering Hills regarding the sale price.

March 28, 2005. SDG&E, Whispering Hills, and ORA submit opening comments on the draft decision.

April 4, 2005. SDG&E and ORA submit reply comments on the draft decision.

April 7, 2005. Commission unanimously approves draft decision, adopted as D.05-04-007. That Decision considered the various arguments presented, and held:

> Nevertheless, based on the record before us, we cannot say that $100,000 is a reasonable price for the property that SDG&E proposes to sell. The information presented by the local residents casts significant doubt upon the adequacy of that price. While we understand the counterbalancing factors presented by SDG&E and Whispering Hills, we do not find them adequately persuasive to completely rebut the argument of the local residents that the proposed sale price is inadequate. (D.05-04-007, p. 6.)

Accordingly, rather than try to set a price based on the conflicting record, the Commission directed SDG&E to enter into further negotiations with Whispering Hills regarding the price to be paid for the property, taking into consideration the information provided by the local residents regarding the potential value of the property, with the expectation that these further negotiations would result in SDG&E receiving a higher price. (*Id.*)

The Decision directed SDG&E to submit a motion requesting leave to modify its application to reflect the results of its further negotiations with Whispering Hills.

September 2, 2005. SDG&E submits a motion to modify the application to reflect the renegotiated sales price. SDG&E obtained a new appraisal, and based on that appraisal, negotiated a sale price of $287,967. This amount is the amount (determined by the appraisal) by which the value of the land conveyed in fee by SDG&E exceeds the value of the easement rights conveyed by Whispering Hills.

Contained in the appraisal is the following chart, which sets forth the calculation of the $287,967:

SDG&E Fee Property to be sold to WHLLC (Total 13.82 acres):

Unencumbered Development Area	2.94 ac. x $650,000	= $1,911,000
Encumbered Development Area	0.29 ac. x $650,000 x .10	= $ 18,850
Unencumbered Open Space Area	4.59 ac. x $ 25,000	= $ 114,750
Encumbered Open Space Area	6.00 ac. x $ 25,000 x .10	= $ 15,000
Sub-Total	13.82 ac.	$2,059,600
Deduction for Demolition and Removal of Power Lines		($ 961,228)
Total		$1,098,372

SDG&E Easement from WHLLC (Total 7.52 acres)

Development Area (less overlap)	0.93 ac. x $650,000 x .90	= $ 544,050
Development Area Overlap	0.29 ac.	N/A
Open Space Area (In TM 16634)	4.17 ac. x $ 25,000 x .90	= $ 93,825
Open Space Area	2.13 ac. x $ 90,000 x .90	= $ 172,530
Total	7.52 ac.	$ 810,405

The value of the land being conveyed in fee by SDG&E exceeds the value of the easement rights conveyed by WHLLC by a total of $287,967.

(SDG&E Motion, tab 2, p. 27.)

SDG&E also proposed an allocation of the $287,967 sale proceeds which would provide ratepayers with $120,033.50.

September 19-22, 2005. Whispering Hills, Mr. Mathewson, Mr. Nielsen and ORA file responses to SDG&E's motion.

Whispering Hills supported SDG&E's motion, and urged the Commission to promptly approve the sale at the price of $287,967.

Mr. Mathewson argues that the appraisal "has in essence issued a $961,228 credit to Whispering Hills for the demolition and removal of power lines." (Mathewson Response, p. 4.) According to Mr. Mathewson:

> Whispering Hills is proactively attempting to purchase this parcel so that they are able to satisfy the terms of the $52 million agreement that they have entered into with CUSD and to allow them to build more homes than they would otherwise be able to. If it were not for the Whispering Hills project, SDG&E would not be considering any changes at all to the power lines in question, and they certainly would not be going out to bid for the demolition and removal of power lines that are in excellent operating condition. (*Id.*, pp. 4-5.)

Mr. Nielsen raises a number of criticisms of the new appraisal of the property. Like Mr. Mathewson, he objects to the appraisal's inclusion of the $961,228 offset for the removal of SDG&E power lines, which he argues amounts to "double dipping" by Whispering Hills. (Nielsen Response, p. 3.) He also argues that the appraisal ignores the diminished value of some of the land being traded by the developer because it is designated ridgeline, which cannot be graded or developed, and he states that in examining the sale of land to the School District, the appraisal attributes the cost of mitigations to Whispering Hills:

> By so doing, the appraisal substantially reduces the value of this comparable due to assuming the developer must bear the cost of the mitigation measures. Unfortunately, the appraiser completely ignores the fact that the developer is the beneficiary of a Mello-Roos tax that has been approved by the school district and the City of San Juan Capistrano that will effectively reimburse the developer for most, if not all of these mitigation costs. There is absolutely no mention of the Mello-Roos tax agreement in the Anderson report. In fact, on page 24 of the Anderson report, the appraiser specifically cites the mitigation that must be completed by the seller (Whispering Hills) as a reason to downward adjust the comparable

> price. Adding back the mitigation costs that are being reimbursed by the Mello-Roos would again further increase the land value. (*Id.*, p. 4.)

ORA supported SDG&E's motion for a sale at the new price, arguing that it confirmed the inadequacy of the originally proposed sale price. However, ORA criticized SDG&E's proposed allocation of the sales revenues as unfair and inconsistent with D.05-04-007, and argued that according to the express language of D.05-04-007 ratepayers should receive $193,983.50, rather than the $120,033.50 proposed by SDG&E.

September 27, 2005. SDG&E requests leave to respond to ORA, Mr. Nielsen and Mr. Mathewson. The ALJ grants SDG&E leave to respond to the issue of the $961,228 offset for removal of towers and lines raised by Mr. Nielsen and Mr. Mathewson.

October 3, 2005. SDG&E submits its reply to Mr. Nielsen and Mr. Mathewson. In its reply, SDG&E states:

> The appraisal clearly states that the Offset to the value of the SDG&E property arises from costs incurred by the Buyer to demolish and remove the improvements from the SDG&E property (the "Removal Costs"). The purpose of the transaction is to sell the unimproved land to the Buyer. SDG&E could add the Removal Costs to the selling price and receive that added sum from the Buyer, but SDG&E would then pay out the Removal Costs to have the facilities removed. The net impact to SDG&E is the same as the transaction proposed here - SDG&E receives the value of the unimproved land. (SDG&E Reply, p. 2.)

October 5, 2005. Mr. Nielsen and Whispering Hills seek leave to file additional pleadings. The ALJ denies their requests.

January 4, 2006. The Assigned Commissioner and ALJ issued a Joint Ruling requesting additional documentation from SDG&E, because a review of

the record on the issue of the $961,228 offset found language in the Purchase and Sale Agreement between SDG&E and Whispering Hills that referred to a: "separate agreement between Buyer and Seller, not a part of this Agreement, by which Buyer agrees to pay the total cost of the permanent relocation..."[8] SDG&E had not provided the Commission or the parties this "separate agreement," and accordingly it was not in the record of this proceeding. The Joint Ruling requested that the "separate agreement" be filed and served, and allowed parties to comment on the meaning and significance of the "separate agreement."

January 12, 2006. SDG&E submitted a compliance filing consisting of an "Electric Transmission Facility Relocation Agreement" between SDG&E and Whispering Hills, prepared on November 17, 2005 and signed by Whispering Hills on November 21, 2005 and by SDG&E on January 10, 2006. According to the Relocation Agreement, the engineering services and construction work necessary for the project are defined in a separate document called an Engineering Fee Request, which SDG&E did not file and serve. The ALJ requested SDG&E to also file and serve the Engineering Fee Request.

January 13, 2006. SDG&E filed and served the Engineering Fee Request, along with a payment fee summary schedule in support of its approximately $7.5 million relocation cost estimate.

January 23, 2006. Mr. Mathewson and Whispering Hills submit comments on the compliance filing.

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[8] From Paragraph 16.2. Similar language also appears in Paragraph 16.1.

Mr. Mathewson largely reiterated his earlier arguments that the proposed sale price is significantly too low, and proposed a basis for calculating a sale price of around $7 million.

Whispering Hills argues that the documents in the compliance filing, which it refers to as the "Relocation Documents" are of no significance to the application, except to memorialize that Whispering Hills has paid the entire cost of relocating SDG&E's transmission and distribution lines. (Response of Whispering Hills to Filing of SDG&E, pp. 1-2.) The Relocation Documents report the terms on which SDG&E has carried out the permanent relocation, including Whispering Hills' payment of approximately $7.5 million to SDG&E to cover the entire cost of the relocation. "That relocation cost is irrelevant to the price SDG&E should charge Whispering Hills for the exchange of properties involved in the proposed transaction, because the relocation cost, whatever it may be, has been borne entirely by Whispering Hills." (*Id.*, p. 2.) The documented $7.5 million payment, however, does not appear to include the cost of removing the existing power lines.

April 25, 2006. The ALJ issues a draft decision that denies the sale at the price of $287,967, and states that the transaction would be approved if the sale price is increased $961,228 for a total price of $1,249,195.

May 15, 2006. SDG&E and Whispering Hills agree to the higher price.

Price

The consensus of all parties is that the total cost of relocating SDG&E's power lines is to be borne entirely by Whispering Hills. The issue we have to address and resolve is whether the transaction, as proposed by SDG&E, is consistent with that understanding. The removal of the existing power lines is

the only area where there is a contested issue regarding who is bearing the costs of the relocation.

SDG&E does not argue that it has received the removal costs from Whispering Hills, but rather that it is reasonable for the costs incurred by Whispering Hills for removing the existing power lines to be deducted from the selling price of the property. Nielsen and Mathewson argue that the deduction of the cost of removing the existing power lines shifts part of the cost of relocating the transmission lines from Whispering Hills to SDG&E's ratepayers.[9]

The way the transaction treats the removal costs is set forth in the latest appraisal:

SDG&E Fee Property to be sold to WHLLC (Total 13.82 acres):

Unencumbered Development Area	2.94 ac. x $650,000	= $1,911,000
Encumbered Development Area	0.29 ac. x $650,000 x .10	= $ 18,850
Unencumbered Open Space Area	4.59 ac. x $ 25,000	= $ 114,750
Encumbered Open Space Area	6.00 ac. x $ 25,000 x .10	= $ 15,000
Sub-Total	13.82 ac.	$2,059,600
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SDG&E Easement from WHLLC (Total 7.52 acres)

Development Area (less overlap)	0.93 ac. x $650,000 x .90	= $ 544,050
Development Area Overlap	0.29 ac.	N/A
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Open Space Area	2.13 ac. x $ 90,000 x .90	= $ 172,530
Total	7.52 ac.	$ 810,405

The value of the land being conveyed in fee by SDG&E exceeds the value of the easement rights conveyed by WHLLC by a total of $287,967.

(SDG&E Motion, tab 2, p. 27.)

As set forth above, in the new appraisal, the appraiser determined the market value of the land that SDG&E proposed to sell to Whispering Hills to be

[9] It also shifts part of the costs to SDG&E's shareholders, under the shared revenue allocation adopted in D.05-04-007.

$2,059,600, minus a deduction of $961,228 for the cost of demolition and removal of the existing power lines on the land, for a total value of $1,098,372. The appraiser also determined that the easements that SDG&E would receive from Whispering Hills have a market value of $810,405. The difference between the value of the land ($1,098,372) and the easements ($810,405) is $287,967. (SDG&E Motion, tab 2, pp. 26-27.)

Mr. Nielsen and Mr. Mathewson argue that the appraiser's deduction of the cost of removing the existing power lines shifts part of the cost of relocating the lines from Whispering Hills to SDG&E's ratepayers. As Mr. Mathewson put it: "If it were not for the Whispering Hills project, SDG&E would not be considering any changes at all to the power lines in question, and they certainly would not be going out to bid for the demolition and removal of power lines that are in excellent operating condition." (Mathewson Response, p. 5.)

SDG&E attempts to rebut Nielsen and Mathewson's criticism of the $961,228 offset by offering this description of the transaction:

> The appraisal clearly states that the Offset to the value of the SDG&E property arises from costs incurred by the Buyer to demolish and remove the improvements from the SDG&E property (the "Removal Costs"). The purpose of the transaction is to sell the unimproved land to the Buyer. SDG&E could add the Removal Costs to the selling price and receive that added sum from the Buyer, but SDG&E would then pay out the Removal Costs to have the facilities removed. The net impact to SDG&E is the same as the transaction proposed here - SDG&E receives the value of the unimproved land. (SDG&E Reply, p. 2.)

This statement is not supported by the record. SDG&E claims that "The purpose of the transaction is to sell the unimproved land to the Buyer," but provides no citation or other support for that statement. Furthermore, SDG&E

does not provide any reason why, if it added the removal costs to the sale price, it would then have to pay the cost of having the existing facilities removed.[10]

In fact, the record contradicts SDG&E's position. The Purchase and Sale Agreement (Agreement) between SDG&E and Whispering Hills (attached as Tab 2 to the Application) states: "Buyer will pay Seller's actual costs of this relocation pursuant to a separate agreement not a part of this Agreement." (Agreement, Paragraph 16.1.)

Similar language appears in Paragraph 16.2: "After the Commission decision permitting the grading requested in Section 16.1 above and approving the sale of the Property (reserving the Reserved Easement to Seller), and subject to the separate agreement between Buyer and Seller, not a part of this Agreement, by which Buyer agrees to pay the total cost of the permanent relocation, Seller will relocate the Temporarily Relocated Facilities into the permanent underground and overhead Easement, attached as Exhibit C." (*Id.*)[11]

Given that Paragraph 16.1 of the Agreement states that Whispering Hills will pay the "actual costs" of SDG&E's temporary relocation of its facilities, and Paragraph 16.2 states that Whispering Hills will pay the "total cost" of the

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[10] When SDG&E says it "could add the Removal Costs to the selling price," that appears to mean adding them to the current selling price, which would be equivalent to not subtracting them in the calculation of the selling price. It is unclear why SDG&E would somehow become responsible for the cost of removal if it is not subtracted from the selling price.

[11] The "separate agreement not a part of this Agreement" referred to in Paragraphs 16.1 and 16.2 was not part of the record of this proceeding until SDG&E was ordered to provide in the Joint Assigned Commission and ALJ Ruling. Upon review, we generally agree with Whispering Hills' characterization of the separate agreement as not significant to this proceeding.

permanent relocation of the facilities, we find no basis for SDG&E's claim that it would somehow be required to pay for the cost of removing the existing facilities.

Whispering Hills agrees that it is to pay the entire cost of the relocation of SDG&E's power lines. (Response of Whispering Hills to Filing of SDG&E, 1/23/06, p. 2.) Whispering Hills also acknowledges that it is taking the property "as is." (Whispering Hills Comments, 12/10/04, p. 6.) Paragraph 10.1 of the Agreement between SDG&E and Whispering Hills (attached as Tab 2 to the Application), states that the "Buyer agrees to accept the Property "**as is**," "**where is**," and "**with all faults**" which may exist…" (emphasis in original).[12]

SDG&E's original application states that: "At Developer's request and expense, SDG&E has agreed to relocate three (3) overhead 138kV transmission lines and one (1) overhead 12 kV distribution line first on a temporary basis and then underground on a permanent basis." (SDG&E Application, p. 4.)

Also in its application, SDG&E argues that the transaction with Whispering Hills is in the public interest because: "First, Developer's agreement to permanently locate the Facilities underground, at its own expense, is consistent with the parties' intent, State regulation and Commission policy." (*Id.*, p. 8.)

The clear intent of the application was that the relocation would be at the developer's expense. If SDG&E removed the existing lines, Whispering Hills

[12] If Whispering Hills had not agreed to pay the cost of relocating the lines, they might be able to claim that "as is" means taking the land with the existing power lines, but reducing its value because the "as is" condition makes it worth less to them as a buyer. That position is not tenable given their agreement to pay the entire cost of relocation.

should have paid SDG&E for the cost of removing the lines. If SDG&E preferred that Whispering Hills perform the removal, Whispering Hills should both pay and bear the cost of that removal, and should not then be able to subtract that cost from the price it paid to SDG&E. The cost of removing the existing lines is part of the cost of relocating the lines. If the cost of removing the existing transmission lines is subtracted from the price the developer pays for the land, the developer is not paying the cost of removal of the existing lines.

By reducing the amount received for the sale of the land, SDG&E is indirectly requiring its ratepayers and shareholders to pay for the cost of the removal of the existing lines.

One possible explanation of the logic behind the $961,228 offset, and the source of the disagreement between SDG&E and Nielsen and Mathewson, may be that the appraisal defined "relocation" as not including the removal of the existing facilities, but only the costs of constructing the new, replacement facilities. James Brabant, who prepared the most recent appraisal, states:

> That cost [$961,228] is only for the demolition and removal of the high-tension power lines that were on the portion of the SDG&E property that will be utilized by Whispering Hills for development. It does not include any costs for the temporary relocation of those high-tension lines or the permanent under-grounding of utilities for their development. (Declaration of James Brabant, p. 1, attached to SDG&E Reply.)

However, under standard Commission usage, relocation of utility facilities (such as electric lines and poles) includes removal of the existing facilities. (See, e.g., D.04-08-036 and D.04-04-013.) In general, and particularly in cases like this, where the primary desire of the buyer is for the existing facilities to be removed from their existing location, Commission policy is that "relocation" of utility

facilities includes the removal of existing facilities. We do not see any reason why SDG&E ratepayers should be paying for the cost of removing functioning utility facilities.

Requiring ratepayers to pay for the cost of relocating a transmission line in order to accommodate a developer is inconsistent with Commission precedent. In D.03-05-063, the Commission sought assurance that utility ratepayers would not pay any part of the cost of relocating a transmission line to accommodate a developer, and specifically found that: "Ratepayers will not be charged the cost of relocating the transmission line." (*Id.*, p. 9, Finding of Fact 3.) SDG&E has not presented any reason ratepayers should be charged part of that cost here.

Sale of the property in question for the price of $287,967, as requested by SDG&E, is not in the public interest. Neither ratepayers nor shareholders are adequately compensated at that price, as they would be paying the cost of removing existing utility facilities.[13] The removal of the existing facilities is not necessary for utility purposes, but only to accommodate Whispering Hills' development project. Whispering Hills, not SDG&E ratepayers and shareholders, should be paying the cost of removing the existing facilities.

However, since SDG&E and Whispering Hills have agreed to increase the sale price by $961,228, to a total sale price of $1,249,195, that has removed the inappropriate cost shift to SDG&E ratepayers and shareholders, and we approve the transaction.[14]

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[13] Under D.05-04-007, shareholders and ratepayers share the proceeds of the sale of the property at issue.

[14] We do not reach the other issues raised by Mr. Nielsen and Mr. Mathewson.

Allocation of Sale Proceeds

In D.05-04-007, we stated:

> To provide the proper safeguards and incentives for the negotiations, in any sale of the property at issue, ratepayers will receive at least the $100,000 originally recommended by SDG&E, and any incremental amount received for the property as a result of further negotiations will be shared equally by ratepayers and SDG&E. (*Id.*, p. 6.)

Accordingly, since the sale price has been revised to $1,249,195, the sale proceeds shall be allocated as follows: the first $100,000 goes to ratepayers, and the incremental amount of $1,149,195 will be divided equally, with ratepayers and shareholders getting $574,597.50 each. The total proceeds would be $674,597.50 for ratepayers and $574,597.50 for shareholders.[15]

In its Motion of September 2, 2005, and based on a sale price of $287,967, SDG&E proposed an allocation of $120,033.50 to ratepayers. SDG&E explains that it reached this number by taking the basis of the property of $73,950, and subtracting that number from the original $100,000 sale price, resulting in a gain of $26,050. SDG&E would then flow through the $26,050 plus $93,983.50 (50% of the remaining gain of $187,967) for a total flow through to ratepayers of $120,033.50. (SDG&E Motion, p. 3, fn. 2.)

SDG&E's proposed method is inconsistent with D.05-04-007, as it uses net gain, rather than sale price, as the basis for its calculations. Even at a sale price of $287,967, the correct approach under D.05-04-007 would be to allocate the first

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[15] If SDG&E is correct that the transaction is taxable, this same calculation method shall be applied on an after-tax basis. This is discussed in more detail in the "Comments on the Draft Decision" section below.

$100,000 to ratepayers, and the incremental amount of $187,967 is divided equally, with ratepayers and shareholders each getting $93,983.50, going to ratepayers and $93,983.50 going to shareholders, for a total of $193,983.50 for ratepayers and $93,983.50 for shareholders. This approach is also supported by ORA. (ORA Response to SDG&E Motion, p. 3.)

CEQA

The larger Whispering Hills Estates development has been subject to review under CEQA. The City of San Juan Capistrano prepared an EIR, and the Capistrano Unified School District prepared two Addendums to the City's EIR. (State Clearinghouse No. 1998-031150.) This Commission's role accordingly is that of a responsible agency under CEQA. In that role, the Commission has reviewed and considered the information in the EIR prepared by the City of San Juan Capistrano and the Addendums prepared by the Capistrano Unified School District. (See, CEQA Guideline 15050(b).)

Because our approval is limited to the sale of specific property, the sale is the "project" for which we must perform a CEQA review. (See, CEQA Guideline 15378(c).) As a responsible agency, we must consider the environmental effects of the sale as shown in EIR and Addendums, and make the appropriate findings. (CEQA Guidelines 15096(f) and 15096(h).)

The purpose of the land sale is to facilitate the development of the land that belonged to SDG&E, and that will belong to Whispering Hills. Accordingly, the environmental impact we must review is the impact of the development on the land being sold by SDG&E. We have already approved and made the necessary CEQA findings for the grading of the project area in D.05-04-007, and need not repeat that review here.

The EIR and Addendums do not separately analyze the environmental impacts of the development on the land owned by SDG&E from the more widespread impacts of the development as a whole. To the extent that we can focus our analysis on the specific land at issue, we will do so, but in general we base our findings upon the EIR and Addendums, as required by CEQA, and we look to their analysis of the environmental impacts of the development. Accordingly, to the extent there is any error in our analysis, we are likely significantly overestimating, rather than underestimating, the environmental impacts of the land sale that we approve today.

The EIR identifies potentially significant environmental effects relating to the development in the areas of Land Use and Planning, Geology and Soils, Hydrology and Water Quality, Air Quality, Transportation and Circulation, Biological Resources, Public Services, Utilities, Aesthetics, and Cultural Resources. For the project ultimately approved, however, the EIR finds that all of these impacts, with one exception, can be reduced to less-than-significant levels with the implementation of mitigation measures. (EIR, pp. 5-34.) The EIR sets forth specific mitigation measures for each of these potential impacts, and repeatedly makes the finding that: "Changes or alternations have been required in, or incorporated into, the project which avoid or substantially lessen many of the significant environmental effects as identified in the EIR." (*Id*.)

The EIR finds that the project will contribute to an unavoidable significant cumulative impact on air quality, which required a Statement of Overriding Considerations. (*Id*., p. 12.)

The original Addendum finds that the environmental effects in the area of Biological Resources will actually be less than identified in the EIR, but in all other relevant respects, this Addendum makes no substantial change from the

EIR's previous analysis. The scope of the second Addendum is limited to reviewing the impact of the temporary relocation of SDG&E's transmission lines, which was not previously reviewed, as the EIR only reviewed the permanent relocation. The second Addendum finds that there is no substantial change from the EIR's previous analysis.

Mitigation measures adopted related to the development include: implementation of design techniques to protect ridgelines such as blending contours and use of variable gradients (Aesthetics and Land Use & Planning); incorporation of recommendations from the Preliminary Geotechnical Investigation (Geology); maintenance of historical peak flows by the use of detention basins or other structures, approval of a Water Quality Management Plan and Storm Water Pollution Protection Plan (Hydrology); compliance with fugitive dust and wind control measures consistent with the South Coast Air Quality Management District Rule 403 (Air Quality); improvements to I-5 ramps and Ortega Highway, La Novia Avenue and San Juan Creek Road, La Novia Avenue and Calle Arroyo, Antonio Parkway/La Pata Avenue and Ortega Highway, Valle Road and I-5/La Nova Avenue, La Novia Avenue south of Calle Arroyo, and Del Obispo Street west of Camino Capistrano (Transportation and Circulation); monitoring, re-vegetation, site restoration, weed control, preconstruction surveys, obtaining specific local, state, and federal permits and authorization, and compensation for loss of certain habitat (Biology); conditions on handling and storage of hazardous materials, and measures to provide for development and maintenance of public park areas (Public Services); ensurance of access easements (Utilities); use of energy-efficient luminaires, reduction of spill lighting and glare, and screening of the high school sport stadium

(Aesthetics); and on-site paleontologist and archaeologist to ensure proper exploration and salvage of any discovered resources (Cultural).

Based upon our review of the EIR and Addendums, and the mitigation measures required by those documents, we find that reasonable and feasible mitigation measures were adopted to avoid or reduce any potentially significant environmental impacts from the development to less-than-significant levels, with one exception. We adopt the applicable mitigation measures for purposes of our approval.

Statement of Overriding Considerations

According to the EIR, the development as a whole has a significant unavoidable cumulative impact in the area of air quality. Because we cannot distinguish the level of impact from the project we approve today from the impact of the project as a whole, in an abundance of caution, the Commission makes the following statement of overriding considerations, consistent with CEQA Guidelines 15093 and 15096.

The final EIR contained a statement of overriding considerations that identified specific benefits that the City of San Juan Capistrano found outweighed the unavoidable adverse environmental effects of the development as a whole. Based on the statement of overriding considerations contained in the EIR, we find that the following benefits identified in the EIR outweigh the unavoidable adverse environmental effects:

1) The project will contribute housing in the City of San Juan Capistrano, and will pay a "Housing In-Lieu Fee" if affordable housing is not provided on-site or by the developer in another location in the City.
2) The project will provide for a location for a high school in the City of San Juan Capistrano, and provides an effective solution to a critical high school overcrowding issue.

3) The High School will serve the emerging student population from within the City of San Juan Capistrano and surrounding areas, and will create approximately 190 permanent teacher, administrator, and service jobs, as well as joint-use facilities such as athletic fields, stadium, theater, and swimming pool.
4) The project provides for hiking and equestrian trails to be implemented per the City's Master Plan of Trails.

Approval

The record in this proceeding is replete with possible values for the property, some expressed as a total price, some as a per-acre price. The following table is provided to aid in the comparison of some of these numbers.[16]

	Source	$ per acre w/o easements	$ per acre w/easements	Total price w/easements[17]
1	SDG&E original proposal	$14,577	$7,246	$100,000
2	SDG&E revised proposal	$79,592	$20,867	$287,967
3	City's avg. per acre value	$725,000	$72,500	$1,000,500
4	Whispering Hills sale of 0.95 acres to CUSD	$1,015,789	$101,579	$1,401,790

We do not wish to spend more time trying to determine the most theoretically perfect price. The above table confirms our earlier analysis regarding the effect of subtracting the removal costs from the sale price.

[16] The original proposal (Line 1) used an assumption that easements reduced the value of the encumbered land by 50%. The revised proposal (Line 2) generally used an assumption that easements reduced the value of the encumbered land by 90%. Lines 3 and 4 calculate the impact of the easements by assuming that the easements cover 100% of the land, and that they reduce the value of the land by 90%. These are conservative simplifying assumptions that likely result in understating the "$ per acre w/ easement" values and the total price.

[17] For Lines 3 and 4, the total price is calculated by multiplying the "$ per acre w/easements" value times 13.8 acres.

Accordingly, since SDG&E and Whispering Hills have agreed to increase the sale price of the property by $961,228, for a total sale price of $1,249,195, we approve the sale and allocate the sale proceeds $674,597.50 to ratepayers and $574,597.50 to shareholders, consistent with D.05-04-007.[18]

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Peter V. Allen is the assigned ALJ in this proceeding.

Comments on Draft Decision

The draft decision of the ALJ was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7. Comments were received from SDG&E and Whispering Hills. In their comments, SDG&E and Whispering Hills each agreed to the increased sale price of $1,249,195. The draft decision was accordingly modified to reflect this agreement. In addition, SDG&E requested that the allocation of the sale proceeds be made on an after-tax basis.

Reply comments were received from the Commission's Division of Ratepayer Advocates (DRA, formerly ORA), who opposed SDG&E's request for after-tax allocation of the sale proceeds, and Mr. Mathewson, who reiterates and expands upon his earlier arguments that the proposed sale price is still too low.

The only record we have on the taxability of the transaction and the amount of taxes is the statement in SDG&E's comments, and DRA's reply comments. Accordingly, we will adopt SDG&E's recommended after-tax allocation on a conditional basis. Specifically, to the extent that taxes are paid on

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[18] If SDG&E is correct that the transaction is taxable, this same calculation method shall be applied on an after-tax basis. This is discussed in more detail in the "Comments on the Draft Decision" section below.

the transaction, the allocation shall occur after taxes, consistent with D.05-04-007. If, for example, SDG&E is correct that taxes on the transaction are $509,047, with after tax proceeds of $740,148, then the sale proceeds shall be allocated $420,074 to ratepayers and $320,074 to shareholders. If the transaction is not taxable, as DRA alleges may be the case, then the allocation should be performed on the sale price, without the subtraction of taxes.

Findings of Fact

1. The proposed sale price of $287,967 is based upon an appraisal that deducts from the market value of the land the $961,228 cost of removing existing utility facilities.

2. The proposed sale price of $287,967 results in SDG&E ratepayers and shareholders paying $961,228 of the cost of relocating existing utility facilities for the benefit of Whispering Hills, a private developer.

3. Commission policy and precedent is that relocation of utility facilities includes removal of existing facilities.

4. SDG&E and Whispering Hills have agreed to increase the proposed sale price by $961,228.

Conclusions of Law

1. The proposed sale of the land at issue at the price of $287,967 is not in the public interest.

2. The proposed sale of the land at issue at the price of $287,967 is inconsistent with Commission policy and precedent.

3. The proposed sale of the land at issue at the price of $287,967 is inconsistent with the stated purpose of SDG&E's application, and is not supported by the record.

4. The proposed sale of the land at issue at the price of $1,249,195 is consistent with the stated purpose of the application, Commission policy and precedent, and is supported by the record.

5. The proposed sale of the land at issue at the price of $1,249,195 is in the public interest.

O R D E R

IT IS ORDERED that:

1. The application of San Diego Gas & Electric Company (SDG&E) for sale of the land at issue at the price of $287,967 is denied.

2. The application of SDG&E for sale of the land at issue at the price of $1,249,195 is approved.

3. We allocate the sale proceeds consistent with Decision 05-04-007, as described above.

4. We adopt the requisite findings and statement of overriding considerations, consistent with the California Environmental Quality Act, as described above.

5. Application 04-07-049 is closed.

This order is effective today.

Dated _____, at San Francisco, California.