

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for a Certificate of Public Convenience and Necessity Concerning the Tehachapi Renewable Transmission Project (Segments 4 through 11)

Application 07-06-031
(Filed June 29, 2007)

CITY OF ONTARIO'S COMMENTS ON THE PROPOSED DECISION

**John E. Brown
Joshua Nelson
BEST BEST & KRIEGER LLP
for City of Ontario
2855 East Guasti Road, Suite 400
Ontario, CA 91761
Telephone: (909) 989-8584
Facsimile: (909) 944-1441
Email: john.brown@bbklaw.com
joshua.nelson@bbklaw.com**

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I. Introduction

The Proposed Decision (PD) in this proceeding must be reversed. It is inequitable, ignores the harm to residents of the City of Ontario (City or Ontario), and inadequately addresses the issues raised in the City’s Amended Petition for Modification Order Undergrounding of Segment 8 (Petition) and related procedural Amended Petition for Modification to Stay Construction of Segment 8 (Stay Petition). Accordingly, Application A.07-06-031 must be reopened to consider undergrounding portions of Segment 8 of the Tehachapi Renewable Transmission Project (TRTP) within the City.

The PD implicitly accepts the notion that the City’s residents do not hold the same community values as the residents of the City of Chino Hills (Chino Hills) and is deliberately indifferent to the resulting disparate treatment. Like Chino Hills, it is undeniable that the size of the towers in Segment 8 is staggering, the existing right of way is too small, and residents could not have reasonably known how imposing the towers would be until they were constructed. In addition to the significant visual impacts, the economic impact on property values in the City is devastating.

The PD: (1) overstates the impact of facts related to the City’s knowledge of the towers prior to April 2014; (2) understates the breadth of Rule 16.4 and the Commission’s ability to entertain petitions for modification to further substantial justice; and (3) applies laches when it is clearly inequitable to do so. Equity requires that communities of Chino Hills and Ontario be treated equally. If the PD is adopted, the Commission would be openly indicating that the community values of the residents of Chino Hill must be respected while the identical community values of Ontario residents can be ignored. We urge the Commission to reverse the

PD and reopen the hearing so the impacts on the City's equally-deserving residents can be properly considered.

II. Standard for Petition for Modification and PD

Under RPP 16.4, anyone can file a petition for modification of a Commission decision. This petition must include the “requested relief and must propose specific wording to carry out all requested modifications to the decision.”¹ The petition must generally be filed within one year of the decision at issue.² However, later petitions may be filed provided that they justify the delay.³ Lastly, “[i]f the petitioner was not a party to the proceeding in which the decision proposed to be modified was issued, the petition must state specifically how the petitioner is affected by the decision and why the petitioner did not participate in the proceeding earlier.”⁴

Here, the PD declines to grant the Petition and related Stay Petition because the PD determines that the City did not meet its burden under Rule 16.4 to explain why it did not participate in the proceeding earlier. Importantly, the PD notes that the City sent the Commission five letters prior to filing the Petition and never requested undergrounding. In addition, the PD determines that the equitable doctrine of laches bars the Petition as further delay in the TRTP will prejudice SCE and other stakeholders. This decision is incorrect as discussed below and must be modified and reversed.⁵

III. PD Should be Modified to Begin Moving Forward with Undergrounding in Ontario

Under RPP 14.3(c), comments on the PD “... shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law.” In this case, the PD makes three important errors: (1) it overstates the impact of facts related to the City's knowledge of the towers prior to April 2014; (2) it understates the breadth of Rule 16.4 and the Commission's ability to entertain petitions for modification to further substantial justice; and (3) it applies laches when it is clearly inequitable to do so.

¹ RPP 14.4(b).

² RPP 14.4(d).

³ RPP 14.4(d).

⁴ RPP 14.4(e).

⁵ The City focuses its Comments on the PD regarding the Petition and not the Stay Petition. Given that the PD indicated that Segment 8 is largely complete within the City, the City is focusing on the merits of its undergrounding request and not a potential construction stay.

A. Need for Undergrounding Only Became Apparent in 2014

As noted above, Rule 16.4 requires the City to articulate why it did not participate in the proceeding earlier. The PD articulates a number of reasons why the City failed to meet this burden. In response to the City's explanation that it only became aware of the impacts of the towers when they were installed within the City, the PD notes,

The argument presumes that Ontario was unaware that the FEIR, certified in 2009, includes plans for 198 foot towers in the City; that in 2011 Ontario had no knowledge such towers actually were standing in Chino Hills, on Ontario's border; and that between 2011 and 2013 Ontario did not know about Chino Hills' multi-faceted effort to obtain undergrounding in its ROW. Finally, the argument altogether ignores that between 2007 and 2013, Ontario sent the Commission five letters about various aspects of the Project design in the City, one of which actually acknowledges that the design includes higher towers. (PD, pp. 18-19.)

The PD then outlines the time and substance of each of the five letters. There is no dispute that the last letter was sent to the Commission in 2013.

The City does not dispute the facts stated above. There is no dispute that the last letter was sent to the Commission in 2013, the FEIR did include plans for new 198 foot towers in the City, the City was aware of undergrounding efforts in Chino Hills, and the City did send five letters from 2007-2013 regarding the TRTP.⁶ These facts are not dispositive.

The PD overstates the importance of the facts relating to the City's knowledge of the towers. The City justifiably relied on the Commission's conclusion in D.13-07-018 that the impacts in Chino Hills were truly unique. They weren't. The City discovered that undergrounding was necessary only after the new, especially taller towers were installed in the City. Those towers, that are part of Segment 8A/8C, were installed beginning in April 2014 and created significant visual and similar impacts.⁷ In one area of the City, residents are entirely surrounded by these extremely tall towers carrying significant loads. This has a significant impact on the daily lives of the City's residents. Specifically, these towers depress property values, affect quality of life, and generally stand as community-wide visual impairments. For

⁶ It is important to note that Segment 8B double-circuit taller towers in Ontario are now carrying two sets of 220 kV lines (previously smaller single-circuit towers carrying one set of 220 kV lines). Similarly, the Segment 8A/C double-circuit taller towers, which previously carried one set of 220 kV lines on a single-circuit tower, are now carrying one set of 500 kV lines along with one set of 220 kV lines, and SCE has repositioned the towers closer to the homes along the north side of the easement.

⁷ PD, p. 18.

example, affected residents have indicated that they are now unable to obtain Federal Housing Administration loans on properties adjacent to the towers. The application should be reopened to permit the Commission to fully assess these new impacts. These impacts demonstrate that the effect on the City is essentially the same as on Chino Hills.⁸ As such, the same community values and concerns that justified undergrounding in Chino Hills justify undergrounding within the City.⁹ There are no meaningful differences between the two communities that justify their disparate treatment.

For similar reasons, the PD overstates the relevance of the City's five letters to the City's Petition. All five letters predated the April 2014 construction of the offending towers within the City. The City justifiably did not request undergrounding earlier because the necessity of undergrounding only became apparent in 2014 with the construction of the towers.

B. Rule 16.4 Allows Modification to Further Substantial Justice

The PD fails to acknowledge that the Commission has used Rule 16.4 in similar situations as a flexible procedural tool to achieve substantial justice. Here, substantial justice (i.e., treating similar communities similarly) justifies any increased cost or delay. Substantial justice would be furthered by the Commission's reopening of this proceeding and the full consideration of the impacts the towers have on the City's residents, particularly where the Commission has done the same for a similar community.

Precedent establishes that the Commission has not applied the justification and timing requirements of Rule 16.4 and its predecessor, Rule 47, in a mechanical way if that would thwart justice; thus, even where the Commission has determined that a petition was not the appropriate procedural remedy, on occasion and for public policy reasons, it has considered the substantive merits and after that review, has either granted or denied the petition.¹⁰ The City implores the Commission to exercise its equitable powers here.

Once the impacts of the towers became apparent, the City decided to utilize similar procedures used by Chino Hills to obtain undergrounding.¹¹ The City filed two petitions for

⁸ Petition, p. 5.

⁹ D.13-07-018, p. 21.

¹⁰ D.13-07-018, Conclusion of Law #1, p. 65-66.

¹¹ The City does acknowledge that Chino Hills had substantially participated in the proceeding prior to filing its petitions for modification.

modification: (1) requesting undergrounding; and (2) requesting a related construction stay.¹² It supported the first petition with pictures of the towers within the City and a short declaration of its City Manager in substantially similar form to that used by Chino Hills. We urge the Commission to review those photographs and compare them to the images used by Chino Hills – the similarities are unmistakable.

Similar to Chino Hills, the City understands and agrees that future studies, analyses, and Commission hearings are required to complete undergrounding within the City. The City simply requests the opportunity to begin work on any necessary studies and analyses and will diligently work to complete this work to avoid any unnecessary delays to TRTP completion. Some delay is inevitable. However, that delay is necessary to ensure that all communities are treated fairly regardless of race and wealth.

The fact that the significant impacts have only become clear in 2014 raises serious questions about the efficacy of outreach performed by Southern California Edison (SCE). At no point did SCE make any serious attempts to reach out to residents to explain the sheer height of these towers. Once the hearing is reopened, these outreach efforts ought to be put under the microscope. Certainly SCE's complaints about the cost of undergrounding at this point in time are significantly undermined by SCE's failures to adequately inform the public of the impacts in a timely manner. Substantial justice is not furthered by ignoring the substantial impacts to residents on the grounds that this might hurt SCE's bottom line.

Given the Commission's approval of Chino Hills' petition, it would be unjust for the Commission to deny the Ontario's petition under essentially the same set of facts.

C. Further Delay to TRTP Is Justified

Lastly, the PD notes that granting the Petition may delay the TRTP for a number of years. Given this delay and the City's failure to seek relief earlier, the PD finds further support for its decision in the equitable doctrine of laches. This determination is incorrect as basic notions of fairness and equity justify any past or future delay. It is simply unfair to allow Chino Hills to receive an underground TRTP, at substantial ratepayer expense, while denying it to Ontario.

This is troubling from a public policy and access to justice perspective. As explained in the Petition, the City failed to participate earlier in this proceeding (or offer to give SCE \$17

¹² City of Chino Hills' Petition to modify Decision 09-12-044 to reopen the record with regard to Segment 8 of the proposed route; City of Chino Hills' Petition to modify Decision 09-12-044 to stay construction of transmission facilities in Segment 8A.

million in real property¹³) in part due to its comparative lack of resources versus Chino Hills. This lack of resources is largely due to the racial and economic disparities between the communities.

To reiterate these differences, based on the 2010 Census, the City's population is 163,924.¹⁴ The median income in the City is \$54,994, with 16.4% of the population living below the federal poverty line. By contrast, Chino Hills' population is 74,799.¹⁵ The median income is \$97,065, with 6.3% of the population living below the federal poverty line.

Moreover, the decision not to underground the lines in the City has a discriminatory impact¹⁶ on the Hispanic and African American populations in the City of Ontario. The census tracts affected¹⁷ by the TRTP in the City have a significantly greater proportion of Hispanic and African American residents than do the affected census tracts in Chino Hills. In Chino Hills, where the TRTP will be undergrounded, the affected population is 22.8% Hispanic and 4.6% African American. In contrast, in Ontario, where the TRTP's 200 foot towers will be visible from the resident's backyards, the affected population is 49.5% Hispanic and 14.1% African American.

The PD provides no response to or explanation for the equal protection and fairness concerns raised by the decision to underground in Chino Hills but not in Ontario. The PD appears unsympathetic to the discriminatory impacts posed by the disparate treatment of the City and its residents in contrast to the treatment afforded to Chino Hills. The PD focuses on finances at the expense of the residents of Ontario. The PD focuses on the cost implications of the undergrounding of Segment 8 rather than addressing the discriminatory impact on the residents of the City. The PD even notes the fact that the wealthier community of Chino Hills was able to offer land valued at almost \$17.4 million to SCE. Does the PD mean to suggest that if a

¹³ See PD, p. 17.

¹⁴ See <http://quickfacts.census.gov/qfd/states/06/0653896.html>. The PD notes that the City has not requested official notice of these statistics. As federal government census information, these facts cannot be reasonably disputed. (RPP Rule 13.9; Evid. Code, § 452(h).)

¹⁵ See <http://quickfacts.census.gov/qfd/states/06/0613214.html>.

¹⁶ As noted in its Petition, the City does not imply or suggest any discriminatory intent by the Commission's or its staff.

¹⁷ The PD expressed confusion regarding census tracts and what this information provided. "Census tracts are small, relatively permanent statistical subdivisions of a county or equivalent entity that are updated by local participants prior to each decennial census as part of the Census Bureau's Participant Statistical Areas Program." (https://www.census.gov/geo/reference/gtc/gtc_ct.html.) Accordingly, affected census tracts are those areas of the cities near the TRTP lines.

community wishes to be treated fairly, that it must commit significant public resources to a private utility company? If this is correct, the implications of this suggestion are extremely disturbing.

The discriminatory impact of the decision to underground the TRTP through Chino Hills but not through Ontario sufficiently justifies any further delay to the TRTP necessary to consider and complete undergrounding within the City.

IV. CONCLUSION

For the reasons stated above, the City respectfully requests that the PD be modified and reversed (with the changes included in the attached Appendix A).

DATED: March 26, 2015

Respectfully submitted,

/s/

Joshua Nelson

Attorneys for City of Ontario

Best Best & Krieger LLP

2855 East Guasti Road, Suite 400

Ontario, CA 91761

Telephone: (909) 989-8584

Facsimile: (909) 944-1441

Email: john.brown@bbklaw.com

joshua.nelson@bbklaw.com

APPENDIX A

PROPOSED REVISIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

Below are the City's proposed revisions to the Proposed Decision.

I. PROPOSED REVISIONS TO FINDINGS OF FACT

~~1. Construction of Segment 8C was substantially completed in November 2014; the only work remaining now is final additional electrical testing, clean up, recontouring and reseeding.~~

~~2. Segment 8B is done—it was completed and energized in June 2011.~~

~~3. Construction continues on portions of Segment A outside of Ontario, though that line is now 95% complete, with the remaining tower and wire construction expected by early April 2015. The portion of Segment 8A in Ontario is largely complete; the construction still remaining in the City consists mainly of final civil work, including signage, final clean up, recontouring and reseeding.~~

~~14. Ontario fails to clearly specify one factual aspect of its request—precisely how many miles of Segment 8 it wants undergrounded.~~

~~5. Within Ontario, Segments 8A and 8B are each a little longer than 5 miles and Segment 8C is a little shorter. Since Segments A and C utilize the same structures for most of their distance, undergrounding requests that all of Segment 8 in Ontario be undergrounded. This would require at least 10 miles of redesign, tear down and reconstruction.~~

~~26. The photographs, in Attachment A to Ontario's amended petition for undergrounding, are not authenticated but are not dissimilar from those in the FEIR's Map & Figure Series Volume or from others, introduced in evidence by Chino Hills, on which D.13-07-018 relies. In fact, they are substantially similar to those submitted by Chino Hills.~~

~~37. The "redline" revisions to some of D.13-07-018's Findings of Fact, Conclusions of Law and Ordering Paragraphs, in Attachment B to Ontario's amended petition for undergrounding, are insufficient to extend that decision's undergrounding order to Ontario. Ontario recognizes that its pleadings alone do not provide sufficient basis for an undergrounding order, and that additional hearings and additional CEQA review would be necessary.~~

~~48. Ontario supports its allegations of new facts with the very brief declaration of its present City Manager, Al C. Boling, which states that he is overseeing the City's legal challenge to the TRTP route within the City. In fact, this declaration is substantially similar to that declaration submitted by Chino Hills in support of undergrounding.~~

~~59. Ontario repeats Chino Hills' contention that the actual impact of the new 200-foot tubular poles is much greater than anticipated in the FEIR and could not be truly appreciated until the poles were installed; the text of D.13-07-018 supports this characterization.~~

~~610. Ontario attempts to distinguishes D.13-07-018's determination that the 220 residential structures along Chino Hills' ROW make that situation unique compared to the 36 residential structures along the north side of Ontario's ROW. There is no justification for the difference between the two lines; but regarding future development in the City, Ontario endorses the argument.~~

~~711. Ontario does not expressly ask us to take official notice of demographics and income levels in Ontario compared to Chino Hills but this data could be established through appropriate sources and legal processes. This data demonstrates a clear difference in racial and economic make-up between the two communities. This raises substantial justice and equal protection concerns.~~

~~12. All of Ontario's allegedly "new" facts raise timing issues, which Ontario's justification fails to acknowledge or discuss.~~

~~13. D.09-12-044 was effective immediately and continued in effect after the applications for rehearing were filed; Ontario filed its initial petitions for stay and for undergrounding nearly five years later. D.13-07-018, the Chino Hills undergrounding decision, was effective immediately, well over a year before Ontario filed its initial petitions.~~

~~814. Most of the structures on Segment 8B have increased in height, resulting in a range of 100 – 155 feet (up from 70 – 130 feet), but the tallest structure actually was reduced from 187 feet to 180 feet. The structures on the Segment 8A/8C route have increased in height and the range is now 125 – 198 feet, compared to the prior range of 70 – 156 feet.~~

~~915. Ontario's claim that the heights of the tallest structures were not known until construction began in April 2014 is factually wrong regarding Segment 8B. Regarding Segment 8A/8C route, the argument is unpersuasive because it presumes that Ontario was unaware that the FEIR, certified in 2009, includes plans for 198 foot towers in the City; that in 2011 Ontario had no knowledge such towers actually were standing in Chino Hills, on Ontario's border; that between 2011 and 2013 Ontario did not know about Chino Hills' multi-faceted effort to obtain undergrounding in its ROW; or that between 2007 and 2013, Ontario sent the Commission five letters about various aspects of the Project design in the City, one of which actually acknowledges that the design includes higher towers. Based on the foregoing, undergrounding is justified as the City only became aware of the true impacts of the towers when towers for Segment 8A/8C were constructed beginning in April 2014.~~

~~1016. Of the five letters Ontario sent to the Commission between 2007 and 2013, a City Manager signed four and a Planning Director signed the fifth. None of the letters contests construction of new overhead structures in the City or suggests that undergrounding through the City be examined as a viable routing alternative – the letters all focus on other design issues. Ontario's undergrounding request, if granted at this late date, would delay the timeline for completion of the TRTP by at least 5 years and would have significant costs for all ratepayers, attributable not only to actual construction costs but also stemming from the delayed completion of the TRTP. This delay is justified given that the City was not aware of the impact of the towers prior to 2014.~~

II. PROPOSED REVISIONS TO CONCLUSIONS OF LAW

1. Pub. Util. Code § 1708 is an extraordinary remedy, which must be exercised with care and in keeping with fundamental principles of res judicata.
2. Under Pub. Util. § 1735, the filing of an application for rehearing of an issued decision does not automatically stay that decision.
3. Ontario has ~~not~~ met its burden of proof under Rule 16.4 to justify its amended petition for the undergrounding of Segment 8 within the City, to establish that it has acted in a timely way by seeking that relief for the first time now, ~~or~~ and to explain why it determined to limit its earlier participation in this proceeding.
4. Ontario's has ~~not~~ met its burden of proof under Rule 16.4 to justify its amended petition for a construction stay of Segment 8 within the City (including that it will prevail on the merits), to establish that it has acted in a timely way by seeking that relief for the first time now, ~~or~~ and to explain why it determined to limit its earlier participation in this proceeding.
- ~~5. The equitable Doctrine of Laches requires a petitioner such as Ontario to act in a timely way to seek relief.~~
- ~~56. Because Ontario has ~~not~~ met its burden of proof, its amended petition for undergrounding should be ~~summarily denied~~granted.~~
- ~~67. Because Ontario has ~~not~~ met its burden of proof, its amended petition for a construction stay should be ~~summarily denied~~granted.~~
- ~~78. This order should be effective immediately to provide certainty to the parties and to avoid any delay in completion of the TRTP.~~

III. PROPOSED REVISIONS TO ORDERING PARAGRAPHS

IT IS ORDERED that:

1. The City of Ontario's Petition For Modification To Order the Undergrounding Segment 8B, filed October 31, 2014, as amended by the City of Ontario's Amended Petition For Modification To Order the Undergrounding Segment 8, filed November 21, 2014, is ~~denied~~granted.
2. The City of Ontario's Petition For Modification To Stay Construction of Segment 8B, filed October 31, 2014, as amended by the City of Ontario's Amended Petition For Modification To Stay Construction of Segment 8, filed November 21, 2014, is ~~denied~~granted.
3. ~~Application 07-06-031 is closed~~The Commission should schedule hearings to determine the most efficient and cost effective manner to underground Segment 8 within the City.