

Decision 11-11-019

November 10, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of Energy  
Division Resolution E-4243.

A.10-04-020  
(Filed April 14, 2010)

**ORDER GRANTING REHEARING AND VACATING  
RESOLUTION E-4243**

This order grants the application for rehearing of Resolution (Res.) E-4243 filed by Alan and Peggy Ludington, Danalynn Pritz, and David J. Tanner (Ludington Parties). Res. E-4243 found that the 66 kilovolt (kV) “Moorpark-Newberry Line” proposed by Southern California Edison Company (SCE) was exempt from the requirements of General Order (G.O.) 131-D.

**I. SUMMARY AND INTRODUCTION**

We have carefully reviewed the allegations contained in the rehearing application. As a result of this review, we have become concerned that the informal nature of this proceeding may have prevented an adequate record from being developed. As discussed in detail below, some of the material we relied upon to make findings in Res. E-4243 was obtained informally from only one party, or was the result of independent research. We would prefer to have all the parties review this information, and offer us their views, before we rely on it to make findings.

In addition, SCE filed a response to the rehearing application (Rehearing Response) suggesting that we rule on several issues that we did not address in Res. E-4243. To resolve these issues, SCE asks us to rely on new factual information that is presented for the first time in its Rehearing Response. We wish to consider this

information in the context of a rehearing. We are reluctant to address these issues in an order responding to a rehearing application, or to address issues that—at this point in the proceedings—would require us to rely on information that was not previously provided to us or to the parties. Finally, rehearing will be granted because Res. E-4243 does not address certain material issues. After reviewing the scope of those issues, we have determined that they should be considered as part of a rehearing.

This order also establishes how proceedings will be conducted on rehearing. As explained below, we are of the view that the informal methods of gathering information used in the advice letter proceeding we conducted may have interfered with the proper development of a record. In addition, informal advice letter procedures were unable to ensure that the parties brought a definite set of issues to us for resolution. For example, we note that the rehearing application, the response, and subsequent pleadings ask us to address new claims that are presented for the first time in those pleadings—and to do so by relying on new factual material.

Because of these and other specific circumstances, we find that a rehearing should be conducted as an application proceeding, not as an advice letter. This decision reflects our view that a formal approach to developing the record should now be taken. Because we wish to use formal mechanisms to develop a record before making any decisions about the Moorpark-Newberry Line, this order does not consider the applicability of G.O. 131-D to that power line. We also base the decision to proceed via an application proceeding on our need for the parties to frame a definitive set of issues for us to consider. We expect that the more structured approach provided by an application proceeding to achieve that result. So that the rehearing can be conducted expeditiously, this order briefly lists some matters that have likely been resolved, rendered moot, or otherwise are no longer at issue in this proceeding.

## **II. BACKGROUND**

This proceeding was initiated when SCE filed (AL) 2272-E. That advice letter gave notice that SCE planned to build the Moorpark-Newberry Line in Ventura County (County). The advice letter was protested by local governments and local area

residents. Over a period of approximately two years we conducted the proceedings that led to the adoption of Res. E-4243. Those events are described in pertinent part below.

**A. SCE’s Proposal and General Order 131-D’s Requirements**

The Moorpark-Newberry Line was designed to be nine miles long, and to operate as a “subtransmission” line, at 66 kV. As proposed by SCE, the Moorpark-Newberry Line would consist of four sections. The first section would be located within the grounds of an SCE substation. For Section 2, SCE would construct new poles and string new wire in an unoccupied portion of its “Ormond Beach-Moorpark” right-of-way. Sections 3 and 4 would exit the Ormond Beach-Moorpark right-of-way and run in other SCE rights-way. There, SCE would replace its existing facilities, and carry both the Moorpark-Newberry Line and its existing power lines on a single set of new poles.

G.O. 131-D contains a provision, known as “Exemption G,” making certain subtransmission lines exempt from active regulation. To qualify for Exemption G, two conditions must be met. First, the proposed line must be “located in an existing franchise, road-widening set-back easement, or public utility easement ....” (G.O. 131-D, § III.B.1.g.) Second, the line must not meet any of G.O. 131-D’s “Exception Criteria,” which are triggered if the line will have certain environmental or other effects. A utility seeking to apply Exemption G must file an advice letter notifying us that it intends to apply the exemption, and give notice to local government officials and the general public. (G.O. 131-D, § XI.B.)

Any interested party may protest an advice letter giving notice that a utility intends to apply Exemption G. A local government body may also require the utility to engage in a consultation process, and may ask that we hold a hearing. (G.O. 131-D, § XIV.B.) If an advice letter is protested, the utility is given an opportunity to respond, after which the staff will conduct a review of the utility’s and protestors’ claims. At the end of this review, the Executive Director will issue an “Action Resolution” determining if Exemption G applies, or, instead, if the utility must make a apply for a permit to construct (PTC). (G.O. 131-D, §§ II.B, XIII.) If the utility or another party contests the

Action Resolution, we will decide the matter. (E.g., *San Diego Gas and Electric Company* (1997) [D.97-03-058] 71 Cal.P.U.C.2d 339.)

**B. Procedures Leading to the Adoption of the Executive Director's Resolution**

Here, SCE proposed to build the Moorpark-Newberry Line pursuant to Exemption G and filed AL 2272-E in October 2008. Many local area residents and associations, along with several local governments, filed timely protests. Most of the protestors live, or represent those who live, near Section 2. The protests discussed a wide variety of issues including: land use, the disadvantages of locating Section 2 adjacent to residential development, fire hazard, and the environmental effects of construction. SCE made a formal response to the protests (Protest Response) on October 31, 2008. SCE argued that the protests failed to state a valid claim showing that Exemption G was incorrectly applied, or that the Exception Criteria had been triggered and, therefore, should be dismissed. (Protest Response at p. 2.) The Protest Response was based on several factual claims but did not contain any documentary attachments.

As is normal in advice letter proceedings, there was informal contact between staff and various parties while AL 2272-E was pending. As part of these informal contacts, SCE provided staff with documentary materials, consistent with G.O. 131-D's provision on "additional information." (See G.O. 96-B, § 7.5.1.) These materials included, at the request of staff, two biological reports that SCE summarized and relied upon in its Protest Response. SCE also provided other materials, as discussed below.

Those opposed to the Moorpark-Newberry Line also supplemented their formal submissions by making contact with Commission staff. We believe the protestors engaged mostly in procedural discussions with staff. However, in November, 2009, two

letters were received from protesting parties, rebutting SCE's Protest Response.<sup>1</sup> This material elaborated on the protestors' environmental claims, and argued that G.O. 131-D must be interpreted so that Exemption G only applies when certain pre-conditions are met. In addition, documentary materials, such as a CEQA document reviewing a nearby recreational facility, were provided directly to staff by protestors.

In February 2009, after certain real estate law questions were resolved, the Executive Director issued Action Resolution E-4225. That resolution determined that the Moorpark-Newberry line was exempt from the PTC requirement, and ordered the protests to be dismissed.

### **C. The Appeal Process and the Adoption of Res. E-4243**

Action Resolution E-4225 was appealed to the full Commission on March 26, 2009 by the Ludington Parties: Alan and Peggy Ludington, Danalynn Pritz, and David J. Tanner. We do not have any record of a response to the appeal filed by SCE. The appeal remained outstanding from March 2009 to March 2010 and was handled as a further stage in the proceedings related to AL 2272-E. That is, the proceedings remained informal, and were governed by G.O. 96-B's rules for disposing of advice letters.

At the beginning of the appeal period, a draft resolution was issued for comment, on May 18, 2009 (May 18 Draft Resolution). Many of the parties who were opposed to the Moorpark-Newberry Line submitted comments on the draft resolution. There is no record of comments on this draft resolution having been submitted by SCE.

While staff was reviewing the comments on the May 18 Draft Resolution, the County requested a hearing pursuant to section XIV.B of G.O. 131-D. The County and the Ludington Parties further insisted that the hearing be held in Southern California.

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<sup>1</sup> When the letters were provided to the Commission they constituted additional information. G.O. 131-D contains no provision allowing interested parties to rebut a utility's response to protests. Further, only one of these letters states that it was provided to SCE, and there is no record to show that both letters were served on all the parties. Ultimately, these letters were attached to the Ludington Parties' appeal, and served, but that event took place four months after the letters were first provided.

After coordinating with the County, the protesters, and SCE, an informal “public participation hearing” (PPH) was set for September 2009. The PPH provided “a forum for the County of Ventura ... [SCE and residents] to discuss land use matters associated with the proposed facilities.” (PPH Transcript at p. 1.)

Parties raised many issues at the hearing, including questions related to the Exception Criteria. Some of the claims made at the PPH were new. For example, the Ludington Parties claimed, apparently for the first time, that historical resources were present along the route of the Moorpark-Newberry Line. (PPH Transcript at p. 30.) An SCE representative made a presentation at the hearing, which represents the only known public statement of SCE’s position on the appeal.

After the PPH, SCE provided additional information to staff on topics that were raised at that hearing. SCE e-mailed to staff an analysis of the brush clearance requirements that apply to property owners who are adjacent to a right-of-way. Staff also conducted independent research. Staff verified SCE’s materials relating to brush clearance and asked consultants working for the Commission on the Presidential Substation to analyze whether that facility had “independent utility” from the Moorpark-Newberry Line. (Res. E-4243 at pp. 19-21.)

The May 18 Draft Resolution was then revised. The revisions summarized the PPH and discussed the issues on which new information had been gathered. Five new findings of fact were added to the draft resolution, relying on SCE’s additional information and the independent material. The revised draft was not recirculated for additional comment. (See Cal. Code Regs., tit. 20, § 14.1, subd. (d).) Consequently, parties were not informed that we intended to consider this informally obtained material when we made determinations regarding the Moorpark-Newberry Line.

During this time, the County continued to exercise its right to consult with SCE, pursuant to G.O. 131-D. (See 131-D, § XIV.B.) Several meetings were held in January and February of 2010. These meetings were attended by County officials, representatives of the Ludington Parties and SCE. No formal record is available of those meetings, and Commission staff did not attend. However, e-mails to Commission staff

from County representatives, along with statements in SCE's and the Ludington Parties' pleadings, suggest that one point of contention was whether or not SCE would provide the County or the Ludington Parties with documents supplementing SCE's formal submissions in the AL 2272-E proceedings. (E.g., Rehearing Application at pp. 9, 49.)

While the County, SCE and the Ludington Parties engaged in the consultation process, the revised resolution appeared on the Commission's agenda for several meetings, but was held. On March 11, 2010, we took up the matter, and adopted the revised draft as Resolution E-4243.

**D. The Rehearing Application, Response, and Subsequent Pleadings**

The Ludington Parties timely filed an application for rehearing of Res. E-4243. Among other things, the rehearing application challenges the legality of G.O. 131-D itself, asserts that certain CEQA procedures must be followed here, alleges that we committed numerous procedural errors, and asserts that SCE's easements do not allow it to construct a 66 kV line in the Ormond Beach-Moorpark right-of-way. The rehearing application also claims that the existence of cumulative impacts, sensitive species, hazardous conditions, unusual circumstances and historical resources all trigger G.O. 131-D's Exception Criteria. In addition, the Ludington Parties claim that the procedures used to resolve the protests to AL 2272-E departed from our rules, and failed to afford the Ludington Parties due process of law. (E.g., Rehearing Application at p. 2.)

SCE's response to the rehearing application (Rehearing Response) declines to address the majority of the Ludington Parties' allegations. SCE specifically did not address any of the Ludington Parties' procedural or due process claims. (Cf. Rehearing Response at p. 3.) The Rehearing Response only contests three of the allegations made in the rehearing application: claims regarding the adequacy of SCE's rights-of-way, assertions about historical resources, and contentions that our protest procedure did not properly account for the County's land use concerns. The Protest Response quotes from and discusses two additional sets of documentary materials: (1) the condemnation orders establishing the Ormond Beach-Moorpark right-of-way, and (2) a cultural resources

survey undertaken in 2007. SCE also provided a copy of an e-mail message to support its factual claims about the consultation process.

On June 2, 2010, the Ludington Parties filed a motion seeking permission to file a third-round pleading. This proposed Reply Brief attempts to counter the points made in SCE's Rehearing Response, and to rebut the SCE's new documentary material. On June 16, 2010, SCE formally responded to this motion (Motion Response). SCE asserts that under Rule 16.1 of our Rules and Practice and Procedure parties may not file third-round pleadings in applications for rehearing. (See Cal. Code Regs., tit. 20, § 16.1) SCE also discusses the points made by the Ludington Parties in their proposed Reply Brief.

### **III. DISCUSSION**

#### **A. Uncirculated Material and Independent Research**

As the summary of the key events shows, some of the information that we gathered describing the effects of the Moorpark-Newberry Line was not obtained as part of the formal development of the AL 2272-E record. Res. E-4243 made several findings based on these informal materials, as noted its discussion section. At page 13, the resolution acknowledges that "SCE submitted a memorandum from Bonterra Consulting" and page 19 of the resolution summarizes the informal communication between SCE and staff relating to brush clearance requirements. At page 21, the resolution states that CEQA consultants working on the Presidential Substation project conducted the analysis finding that substation to be independent from the Moorpark-Newberry Line.

Now that we have had an opportunity to review of the record for AL 2272-E, we realize that these materials were not seen, or commented on, by all of the parties to AL 2272-E at the time they were submitted or thereafter. Moreover, parties may not have known that we intended to consider these materials when we decided whether or not SCE was applying Exemption G correctly. We would prefer to circulate these materials to all parties, and to obtain feedback, before relying on them to resolve contested issues. Although staff may obtain material on an informal basis in advice letter



proceedings, our rules do not provide a mechanism under which we can rely on informally obtained information to make findings of fact without giving notice and opportunities to be heard regarding this information. (Cf. G.O. 96-B, § 7.5.1; see generally 9 Witkin, Summary of Cal. Law (10th ed. 2005) § 664, p. 1078.)

Consequently, a rehearing should be held to develop the record in the manner that we prefer so that we can properly assess the potential effects of the Moorpark-Newberry Line.

Further, SCE has now asked us to consider additional factual material presented for the first time in its Rehearing Response—even though SCE also claims the Ludington Parties may not properly comment on this material. (Motion Response at p. 2.) We do not wish to resolve the disputes between SCE and the Ludington Parties by relying on this material until the Ludington Parties have had an opportunity to respond to it. The Rehearing Response, however, appears to acknowledge that we must review this material if we are to find that Exemption G applies here. We have therefore determined that rehearing should be granted if these issues are to be considered.

## **B. Unresolved Material Issues**

We are also choosing to grant rehearing because we wish to address several issues that were not discussed in Res. E-4243. Our review of the information we have gathered regarding the Moorpark-Newberry Line suggests that these questions are material, and we wish to consider those issues before reaching any conclusions about the potential effects of the Moorpark-Newberry Line.

### **1. Critical or Hazardous Environmental Resources**

If any of G.O. 131-D's Exception Criteria apply to a power line, Exemption G "shall not apply ...." (G.O. 131-D, § II.B.2.) The first of these Exception Criteria is triggered if:

there is reasonable possibility that the activity may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped and officially adopted pursuant to law by federal, state, or local agencies[.]

The Moorpark-Newberry Line will be built within two officially designated resources of hazardous or critical concern. Specifically, our review of SCE's biological reports shows that all of Section 3 (and a portion of Section 2) will be built in the United States Fish and Wildlife Service's Montclair Ridge 2A Critical Habitat for the plant Lyon's Pentstemon (USFWS Critical Habitat). (BonTerra Consulting Report, July 18, 2008.) We have not found any formally submitted material from SCE addressing whether or not there was a possibility that the Moorpark-Newberry Line would affect sensitive plant species or their habitat. (See Protest Response at pp. 10-11 (discussing wildlife only).)

In addition, formally submitted material states that approximately 1.5 miles of the southern portion of the Moorpark-Newberry Line will pass through an officially designated "Very High Fire Hazard Severity Zone." (Protest Response at p. 8.) SCE's formally submitted material shows that where the Moorpark-Newberry Line would cross the fire hazard area the utility would renew an existing line with new facilities, and states that adding these new facilities would not increase the risk of fire. (Advice Letter 2272-E at p. 2; Protest Response at p. 9.)

G.O. 131-D plainly states that Exemption G "shall not apply" if there is a reasonable possibility that a power line may have an impact on "an environmental resource of hazardous or critical concern ...." (G.O. 131-D, § III.B.2.a.) Because such resources are present here, we believe we should consider whether there is a reasonable possibility that the Moorpark-Newberry Line will create an "impact" as part of the process of determining whether or not Exemption G applies. Res. E-4243, however, did not fully analyze this question. Res. E-4243 only considers whether or not the construction of the power line will affect individual plants, not plant habitat—even though a portion of the Moorpark-Newberry Line will be constructed within a critical habitat, and the Ludington Parties specifically advanced a "claim that the habitat of special status plants ... will be lost ...." (Res. E-4243 at pp. 13, 23 (Finding of Fact 16).) The resolution also does not analyze whether or not building the Moorpark-Newberry Line would have an impact on the designated fire hazard zone. Instead, Res. E-4243

considers fire hazards under a different exception criterion concerning unusual circumstances. (Res. E-4243 at p. 23 (Finding of Fact 13).)

Because we would prefer to undertake a more complete analysis that considers whether there is a reasonable possibility that the Moorpark-Newberry Line will affect these areas of critical or hazardous concern, we will hold a rehearing. Although there appears to be enough formal information in the current record to resolve questions regarding the fire hazard zone, we do not believe we are in a position to determine the effect of the Moorpark-Newberry Line on plant habitat.

In this context, we wish to comment on an assertion made by SCE in its Protest Response.<sup>2</sup> There, SCE contended that the protests to AL 2272-E could be dismissed for failure to state a valid claim because they did not “allege facts or evidence” with enough detail and specificity to conclusively prove that the Exception Criteria apply. (Compare G.O. 131-D, § XII with Protest Response at pp. 2, 5-6.) We are not certain, but it appears that the utility is asserting that a presumption applies to its claim that the Moorpark-Newberry Line falls under Exemption G, and that a proposed subtransmission line should qualify for Exemption G unless a protest makes a claim that meets a certain standard of proof.

We do not find support for this view in the general order. G.O. 131-D states plainly that Exemption G “shall not apply when any of the conditions” described in the Exception Criteria are met, without placing a burden on any party. (G.O. 131-D, § III.B.2.) The general order also provides that when a protest is filed, the Executive Director and staff will review the material provided by the protestors and the utility to make a determination about whether a PTC should be required “or the protest should be

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<sup>2</sup> SCE asserts that each issue not discussed in the Rehearing Response was discussed in its Protest Response. (Rehearing Response at p. 3.) The Protest Response does not make any mention of plants or plant habitat, so we assume SCE continues to rely on general claims regarding the specificity of the Ludington Parties assertions to rebut the rehearing application’s claims regarding plant habitat. (See Protest Response at pp. 5-6.) We note that it is not effective or proper to use incorporation by reference to present claims at the rehearing stage because, among other things, the nature of the issues often changes. (*Modifying and Denying Rehearing of D.10-12-052* [D.11-04-034] (2011) at p. 27.)

dismissed for failure to state a valid reason.” (G.O. 131-D, § XIII.) The Public Advisor’s office is to assist protestors, providing them with guidance on what grounds constitute a valid protest. (G.O. 131-D, § XIII.)

These provisions outline a process under which the applicability of Exemption G is to be determined by staff. When G.O. 131-D provides that a protest should be dismissed if it fails to state a valid claim, it does so in a sentence that also charges staff and the Executive Director with the responsibility of evaluating the parties’ filings to make a determination about “whether” a PTC should be filed. (G.O. 131-D, § XIII.) G.O. 131-D further contemplates that protestors will be provided with guidance on how to make a valid protest. None of these provisions suggest that a utility is entitled to a presumption that Exemption G applies, or that utilities can claim an exemption as a matter of right. We have also clearly held that whether or not the Exception Criteria are triggered is to be decided by applying the general order’s requirements—as written—to the facts presented, rather than by relying on “narrow” procedural considerations, such as whether the protestors meet a “burden.” (*San Diego Gas and Electric Company* [D.97-03-058], *supra*, at pp. 343-343.)

As a result, it would be improper for us to find that Exemption G applies without analyzing the effect of the USFWS Critical Habitat or the Very High Fire Hazard Severity Zone on the Exception Criteria. In this particular case, we specifically reject the idea that we can find that Exemption G applies—even though our staff has obtained surveys showing that the Moorpark-Newberry Line would be built in the USFWS Critical Habitat—simply because the Ludington Parties did not independently discover the location of the USFWS Critical Habitat, and re-submit that information to us.

## **2. Historical Resources**

The Exception Criteria are also triggered “when any of the conditions specified in CEQA Guidelines § 15300.2 exist.” (G.O. 131-D, § III.B.2.) Guidelines section 15300.2, subdivision (f), states a condition that will occur if a “substantial adverse change to the significance of a historical resource” will result from an activity. The effect of Guidelines section 15300.2, subdivision (f) was raised by one of the Ludington Parties

at the PPH. (PPH Transcript, pp. 20-30.) Res. E-4243 did not discuss this issue, however.

SCE appears to concede that we must discuss historical resources if we are to lawfully conclude that Exemption G applies. The question of historical resources is one of the three issues raised in SCE's Rehearing Response, and that pleading provides additional factual material on this topic. Specifically, SCE describes surveys conducted in 2007, and makes the following factual assertions: (i) a review of archival material showed no known sites of historical interest in the right-of-way, with the Native American Heritage Commission having been consulted; and (ii) a field survey revealed only one possible archaeological site, which SCE proposes to cordon off from construction. (Rehearing Response at p. 6.) SCE does not provide a copy of its historical survey and other material, which is generally kept confidential to protect the resources in question. SCE also states that it will follow protocols during construction to avoid disturbing archaeological resources. (Rehearing Response at p. 7.)

Both the Ludington Parties and SCE claim or suggest that we should address this issue, and we agree that we should consider it. However the main factual material on this topic was provided in the Rehearing Response, with SCE opposing the Ludington Parties' request to respond to it. We wish to develop a proper record, and to carefully consider this issue based on such a record. For this reason as well, we believe rehearing should be granted.

### **C. Issues That Likely Will Not Need Additional Consideration**

The rehearing application is over 50 pages long and contains an exhaustive critique of almost every aspect of Res. E-4243. We are granting rehearing because of the specific issues discussed above, and this grant of rehearing should not be interpreted as decision finding that the rehearing application's claims on other topics have merit. Without prejudging the results of the rehearing, we will briefly comment on a number of issues that we currently believe do not require any further consideration. At this time, these issues appear to be moot, based on clearly unmeritorious claims, or otherwise undeserving of further consideration.

**1. Procedural Issues Regarding Notice, Circulation of Drafts, and the Conduct of Voting Meetings**

The rehearing application claims that many of the steps taken in the AL 2272-E proceeding were improper. Our current view is that these claims are not meritorious because they are either moot, or incorrect. In the rehearing we wish to focus on the actual matter at hand, and to avoid revisiting stale grievances between the parties. We will briefly review certain claims presented in the rehearing application to prevent those issues from being re-litigated unnecessarily.

The rehearing application's claim that the public notice SCE gave when it filed AL 2272-E was inadequate is now moot. (Rehearing application at pp. 15-18.) If an inadequate notice had deprived local residents or governments of the ability to mount an effective protest, then questions about the adequacy of the notice might still be relevant. This is not the case. At this point, we believe we should focus on substantive issues, not questions about a notice given in 2008 that clearly served its purpose.

Similarly, we believe we no longer need to review claims about whether the notice of the PPH contained "improper restrictions[.]" (Rehearing Application at pp. 6-7, 14 (emphasis omitted).) That notice clearly stated that "all speakers will be able to fully express their views." (Notice of Public Hearing at p. 2.) Further, the decision to hold the PPH in September 2009 was made in direct response to requests from the County and a strongly worded communication from one of the Ludington Parties. Therefore we do not believe that the rehearing application's claims about the timing of the PPH present an issue that merits further consideration. (Cf. Rehearing Application at p. 14.)

The rehearing application also makes several claims about our agenda process and the circulation of draft Commission orders in advance of voting meetings. (Rehearing Application at pp. 8-10, 11-13.) We currently see no reason why these issues should continue to be considered on rehearing. We also wish to direct the parties to Rule 14.1, subdivision (d) of our Rules of Practice and Procedure and to the description of the hold process in our Policies and Guidelines. (See Policies and Guideline, § 1, available on the internet at <http://www.cpuc.ca.gov/PUC/documents/policiesguides.htm> .) We do

not believe that the applicable rules and guidelines have the procedural effects claimed in the rehearing application, in particular that the scheduling of items at our voting meetings must be controlled by private interactions between parties to our proceedings.

## **2. Issues that are Outside The Scope of These Proceedings**

The rehearing application claims that we must consider whether there is a need for the Moorpark-Newberry Line. This is incorrect. We do not perform a need review of power lines designed to operate between 50 and 200 kV. The PTC requirement is structured so that a regulated subtransmission line will receive only environmental review. (GO 131-D, § IX.B.) While the notice provided for a subtransmission line must describe the “purpose” of the power line, this is because the notice requirements are the same as those for over 200 kV lines, not because we will evaluate the need for such a line. (GO 131-D, § X.C.) In *Transmission Lines Not Exceeding 200 kV* [D.94-06-014] (1994) 55 Cal.P.U.C.2d 87, we specifically held that a PTC proceeding “is meant strictly for environmental review, not economic or “needs” review.’ (*Id.* at p. 101.) Subtransmission lines cover short distances, do not present difficult engineering challenges and do not involve significant economic risk or impact. (*Ibid.*)

In this connection, we must comment on the Ludington Parties description of the Moorpark-Newberry Line as an “*enormous*” power line. (Rehearing Application at p. 35 (original emphasis).) The information submitted to us by SCE contains no material supporting the assertion that this power line is a significant undertaking. While the Ludington Parties assert that nine miles is a substantial length for a power line, and that a line comprising 84 utility poles is remarkable for its size, the rehearing application provides no support for these claims—and they are at odds with our understanding of the scale of SCE’s electric facilities. (See Rehearing Application at p. 35.) Further, the maps and photographs provided to us in this proceeding in no way suggest that the Moorpark-Newberry Line is a significant undertaking when compared with other SCE facilities.

Similarly, rehearing application fails to support the claim that a power line is significant simply because it crosses from one suburban community to the next. Under the Ludington Parties’ approach, a much longer power line, or a power line designed to

operate a much higher voltage, would be insignificant as long as it was built entirely in unincorporated areas of Ventura County, i.e, in one jurisdiction. This claim makes little sense. The purpose of environmental review is to consider the effects of a particular activity, not to judge it for extraneous reasons. We reject the view that the number of legal jurisdictions an activity will cross determines the scope of its impacts.

The Ludington Parties are also incorrect to assert that it was error to use G.O. 131-D's standards to determine if the Moorpark-Newberry Line should be subject to the PTC requirement. The rehearing application claims that G.O. 131-D cannot be applied as written and must be re-interpreted to augment its requirements. (Rehearing Application at pp. 20-24.) To the contrary, we have clearly held that G.O. 131-D's provisions are to be applied as written. We specifically rejected the idea that additional requirements should be developed after the fact by speculating about the general order's "spirit[.]" (Compare *San Diego Gas and Electric Company* [D.97-03-058], *supra*, at pp. 345-346 with Rehearing Application at p. 20.) Further, the claim that the general order requires re-interpretation or revision is an impermissible collateral attack on the decision that adopted G.O. 131-D. (Pub. Util. Code, § 1709; *H.B. Ranches v. Southern California Edison Co.* [D.83-04-090] (1983) 11 Cal.P.U.C.2d 400, 405.)

### **3. Issues That Will Not Be Relevant in an Application Proceeding**

Exemption G only applies when a utility will build a subtransmission line in existing easements or rights-of-way. (G.O. 131-D, § III.B.1.g.) In this proceeding, the Ludington Parties claimed SCE did not have the right to build the Moorpark-Newberry Line in the Ormond Beach-Moorpark right of way. For example, one of the Ludington Parties claimed that the language of SCE's easements did not allow the Moorpark-Newberry Line to be placed in the Ormond Beach-Moorpark right-of-way because that language only permitted transmission towers to be constructed in the right-of-way, not the steel poles SCE proposed to use. (PPH Transcript at p. 27.) Res. E-4243, however, did not discuss the scope of SCE's easements. (Res. E-4243 at pp. 8-11.)

SCE itself appears to concede that this issue must be resolved if we are to conclude that Exemption G applies. The Rehearing Response contains a rebuttal of the



Ludington Parties' claims, and introduces new information regarding SCE's authority to build in the Ormond Beach-Moorpark right-of-way. At pages 3-4, SCE quotes an example of its easement language, which states:

There is hereby condemned to plaintiff rights of way and easements in, on, over, along and across the real property hereinafter described as Parcel 1 to construct, reconstruct, suspend, use, operate, maintain, repair, renew, relocate, enlarge, replace and patrol, thereon and thereover, electric transmission lines consisting of lines of metal towers with the necessary foundations, crossarms, insulators, and other appurtenances...; [and] to prohibit the building or placing on said Parcel 1 of any building or structure other than farming fences . . . provided that [such facilities do not] endanger or interfere with the operation of plaintiff's aforesaid electric transmission lines; . . . .

The fact that SCE has provided this language in its response to a rehearing application re-enforces our view that it is prudent to hold a rehearing here. If we were to properly consider the effect of this language, it would be best to do so in a rehearing. This language, like other material, was not provided to us in a manner that allowed all parties to comment on it. (See Motion Response at p. 2.) Further, we believe this issue is likely too complex to be resolved by referring to a single, edited, quotation. In addition to being selective, the quoted language states that it applies only to one specific section of the right-of-way in question.

However, because we will conduct the rehearing as a formal application, we will no longer need to address questions regarding the scope of SCE's easements. The requirement that a subtransmission be constructed in an "existing franchise, road-widening setback easement, or public utility easement" need only be met if a utility seeks to apply Exemption G instead of having its proposal reviewed in an application proceeding. (Compare G. O. 131-D, § III.B.1.g with § III.B.) Since we have determined to hold an application proceeding, the question of the scope of SCE's easements will no longer be material.

We also note that the rehearing application repeatedly claims that Res. E-4243 did not correctly apply standards that are used under CEQA. We question whether the Ludington Parties' understanding of what CEQA requires is correct. We also do not believe that CEQA standards apply to activity that qualifies for a G.O. 131-D exemption, is not subject to active regulation, and therefore is not a CEQA "project." (*Transmission Lines Not Exceeding 200 kV* [D.94-06-014], *supra*, at p. 102; cf. Pub. Resources Code, § 21065.) However we do not need to address this issue on rehearing. If SCE applies for a PTC, the Moorpark-Newberry Line will be a "project" and it will be reviewed under CEQA's standards.

#### **4. The Consultation Process**

The Ludington Parties claim SCE did not comply with GO 131-D's consultation requirement. The rehearing application claims SCE's actions were insufficient because SCE did not engage in consultation before Advice Letter No. 2272-E was filed, and because the County was not able to persuade SCE to change the location of the Moorpark-Newberry Line. (Rehearing Application at pp. 18-19.) We wish to clarify the nature of G.O. 131-D's requirements to avoid further delay in this proceeding.

In Section XIV.B, General Order 131-D provides:

This General Order clarifies that local jurisdictions acting pursuant to local authority are preempted from regulating electric power line projects, distribution lines, substations, or electric facilities constructed by public utilities subject to the Commission's jurisdiction. However, in locating such projects, the public utilities shall consult with local agencies regarding land use matters. In instances where the public utilities and local agencies are unable to resolve their differences, the Commission shall set a hearing no later than 30 days after the utility or local agency has notified the Commission of the inability to reach agreement on land use matters.

This provision requires that consultation take place—not that it takes place at any particular stage in the design process. Further, GO 131-D does not require utilities to adopt the views of local agencies regarding the location of their facilities. Section

XIV.B states that local governments “are preempted from regulating electric power line” construction, and are, instead, provided with the ability to consult with utilities and to bring matters before us at a hearing. There is no question that SCE engaged in consultation, as GO 131-D requires, and the utility claims it did so before AC 2272-E was filed. The claim that local agency concerns “must be considered, addressed and incorporated in determining a project’s planned location” misstates the general order’s requirements. (Cf. Rehearing Application at p. 18.)

Finally, the rehearing application’s discussion of the consultation process contains negative characterizations of SCE’s conduct, which it relies upon to allege error. Although SCE met three times with elected officials from the County, the rehearing application claims that these meetings were not sufficient because SCE “stonewalled” the County and employed “tactics.” The rehearing application further states that SCE’s position was “so ridiculous it can hardly be construed as a good faith negotiations.” (Rehearing Application at p. 20.) These statements are unsubstantiated and appear to reflect little more than animus against SCE. We note that the County, which is the body to which G.O. 131-D gives a right to consult, did not file a rehearing application alleging that the consultation process was not proper. Such claims are not constructive, and have no bearing on the question of whether or not G.O. 131-D’s consultation requirements have been met.

**D. Rehearing Will Be a Formal Proceeding**

We are granting rehearing, in large part, because the informal advice letter process was not structured enough to ensure that SCE and the Ludington Parties presented their claims and evidence in a way that allowed us to properly consider whether Exemption G applied. SCE, for its part, provided very little formal information, and we instead obtained crucial material as “additional information” that could not then be relied upon in Res. E-4243. The Ludington Parties, for their part, continually made additional and supplemental claims, in which they often raised new issues on which no record had yet been developed. Like SCE, the Ludington Parties also submitted informal “additional information” to supplement their formal filings. Because these proceedings were

conducted in this informal manner, staff were unable to consider a properly developed record or analyze a definitive set of claims.

G.O. 96-B states that when the issues raised by an advice letter appear to require more formal review, the advice letter is to be rejected without prejudice, so that the utility may file an “appropriate request for formal relief[.]” (G.O. 96-B, § 5.3.) That approach should be taken here. The appropriate request for formal relief is a PTC filing, which is designed to provide “streamlined” review of only those environmental issues that require CEQA consideration. (*Transmission Lines not Exceeding 200 kV* [D.94-06-014], *supra*, at p. 101.) If SCE applies for a PTC, it will formally provide all the information that is necessary to determine if this project should either undergo CEQA review, or be found to be exempt from that statute’s requirements. (G.O. 131-D, §§ IX.B.1, IX.B.3.)

We are directing SCE to apply for a PTC if it wishes to construct the Moorpark-Newberry Line because we believe it is preferable to have SCE provide information regarding this proposed activity formally. We do not believe we are now in a position to consider whether Exemption G applies to this proposed power line, or whether CEQA review should be conducted, given the type of information we have before us. That means we are not now deciding that this power line is required to undergo CEQA review. If the material SCE formally submits, when it applies for a PTC, shows that the Moorpark-Newberry Line is exempt from CEQA, then the PTC will be granted without further review. (G.O. 131-D, § IX.B.3.) Staff will apply different criteria from the criteria used in Res. E-4243 to make that determination, but we believe this is a reasonable approach to take now that the attempt at informal resolution has been unsuccessful. (G.O. 96-B, § 5.3; see generally, G.O. 131-D, § XIV.A.)

Therefore, we will dismiss AL 2272-E without prejudice, because we find that the unique facts of this case suggest that a more formal review of both SCE’s and the Ludington Parties’ claims is desirable. We will vacate Res. E-4243 for the same reason. We wish to emphasize, again, that this result does not stem from any decision taken on the merits. (Cf. G.O. 96-B, § 5.3.)

#### IV. CONCLUSION

Because the record developed following the filing of AL 2272-E does not allow us to decide if SCE correctly applied Exemption G to the Moorpark-Newberry Line, we will grant rehearing. Rehearing should be conducted as a formal proceeding to prevent parties from making claims and presenting factual material in an ad hoc manner.

**IT IS ORDERED** that:

1. Rehearing of Resolution E-4243 is granted.
2. Resolution E-4243 is vacated.
3. Advice Letter 2272-E is dismissed without prejudice.
4. SCE is directed to apply for a permit to construct pursuant to G.O. 131-D if it wishes to build the power line described in Advice Letter 2272-E.
5. Any construction activity that may now be occurring should cease. Any application for a Permit to Construct that is filed shall disclose the extent of any construction that has occurred and contain an evaluation on the effect of that construction on the permitting process.
6. Any proceedings conducted to review an application by SCE for a permit to construct will be conducted in strict compliance with this Commission's Rules of Practice and Procedure, with parties directed to present their factual material and arguments clearly, concisely, and at the proper time.
7. Application 10-04-020 is closed.

This order is effective today.

Dated November 10, 2011, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
Commissioners