BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

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Application for Rehearing of Energy Division Resolution E-4243	)	A.10-04-020
	)	[Advice Letter 2272-E filed October 2, 2008]

RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO APPLICATION OF ALAN AND PEGGY LUDINGTON, DANALYNN PRITZ, AND DAVID J. TANNER FOR REHEARING OF RESOLUTION E-4243

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Dated: **April 29, 2010**

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I.
INTRODUCTION

Pursuant to Section 16.1(d) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, Southern California Edison Company (SCE) hereby submits its Response to the Application of Alan and Peggy Ludington, Danalynn Pritz and David J. Tanner for Rehearing of Resolution E-4243.

II.
BACKGROUND

On October 2, 2008, SCE provided notice and filed Advice Letter No. 2272-E stating that its Moorpark-Newbury 66 kV Subtransmission Line Project (Project) was exempt from the requirements of Section IX of General Order (GO) 131-D pursuant to Section III.B.1.g. (Exemption g.). This exemption states that compliance with GO 131-D, Section IX.B (requiring a utility to apply for a permit to construct from the Commission) is not required for: "power line facilities or substations to be located in an existing franchise, road-widening setback easement, or public utility easement; . . . "

SCE received numerous protests to the Advice Letter. The protests raised questions about the Project in the following areas: (1) noticing; (2) the application of Exemption g. to the Project; (3) electric and magnetic fields (EMF); (4) safety, including concerns related to wind, earthquake and potential fire hazard; (5) aesthetics and property values; (6) impacts to sensitive plant and animal species; (7) project need; (8) project alternatives; (9) tree removal; (10) climate change; and (11) project construction impacts. SCE responded to each of the claims raised in the protests on October 31, 2008 (Response to Protests). Since the protests failed to demonstrate that either: (1) SCE incorrectly applied for an exemption pursuant to GO 131-D, Section III, or (2) any of the conditions described in GO 131-D, Section III.B.2. existed which would have required SCE to file for a Permit to Construct, SCE argued that the protests should be dismissed.

Executive Director Resolution No. E-4225, dated February 24, 2009, addressed each of the claims raised in the protests and found that (i) SCE's Advice Letter 2272-E was exempt from the Permit to Construct requirements; and (ii) none of the facts alleged in the protests supported a finding that any of the exception criteria contained in GO 131-D Section III. B.2.a-c applied to the Project. Executive Director Resolution No. E-4225 dismissed the protests.

On March 24, 2009, Mr. and Mrs. Ludington appealed Executive Director Resolution No. E-4225 and on March 25, 2009, Ms. Pritz and Mr. Tanner appealed the Executive Director Resolution. (Ludington, Pritz and Tanner are collectively referred to herein as "Appellants".)

On March 11, 2010, the Commission issued Resolution No. E-4243 affirming Executive Director Resolution No. E-4225. Resolution No. E-4243 found that (1) SCE complied with the notice requirements for the proposed construction of the Project; (2) the Project is exempt from the Permit to Construct requirements; and (3) facts claimed by the Appellants do not support a finding that GO 131-D exception criteria apply to the Project. Lastly, Resolution E-4243 dismissed Appellants' appeals of Executive Director Resolution No. E-4225.

Appellants have now filed an Application for Rehearing of Resolution E-4243 dated April 13, 2010 (Application). With limited exception, the Application seeks to overturn Resolution E-4243 on all of the same grounds as were argued in the protests, in the appeals to

Executive Resolution No. E-4225 and in the Commission's public hearing held in Ventura County on September 18, 2009. Except as addressed herein, each of Appellants' arguments has been addressed by SCE in the Response to Protests and also addressed and dismissed by both the Executive Director and the Commission in Executive Director Resolution No. E-4225 and Resolution No. E-4243, respectively. Since neither the facts nor the law have changed since SCE filed the Response to Protests or since Executive Director Resolution E-4225 or Resolution No. E-4243 was issued, SCE believes these allegations have been sufficiently addressed and does not readdress them herein. Instead, SCE incorporates herein by reference, the Response to Protests, Executive Resolution E-4225 and Resolution E-4243.

The Application makes the following claims in support of rehearing that have not been previously addressed by SCE: (i) the Project exceeds the scope of the right-of-way; (ii) Exemption g. is not available because of the Project's "potential and substantial impact on historical resources"; and (iii) Commission approval of E-4243 is unlawful because SCE did not "incorporate the County's land use goals and concerns into its design and location of the [Project]". SCE refutes each of these allegations below.

III.
DISCUSSION

A. The Project Does Not Exceed The Scope Of The Right Of Way.

Appellants argue that the Project exceeds the rights granted to SCE in a condemnation order that created part of the right of way to be utilized for the Project. SCE acquired easement rights in the right of way through two condemnation orders. Although Appellants do not give a specific reference to the condemnation order they question, both condemnation orders grant SCE the following identical rights. The condemnation orders provide as follows:

> 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; . . . .

Appellants allege that the language in the condemnation order allowing "transmission lines consisting of lines of metal towers" does not provide SCE with sufficient easement rights to construct the Project consisting of a "subtransmission" line on tubular steel poles. SCE uses this type of easement language for its rights of ways regardless of the voltage of the transmission line to be constructed within the easement. The use of the term "subtransmission" in the notice to construct conforms to the Commission's use of the term for permitting requirements but has no relevance to the acquisition of rights of way. Similarly, SCE uses the term "towers" to encompass a variety of support structures that may be utilized in the right of way including, lattice steel towers, tubular steel poles, or H-frames. The easements SCE acquires are intended to be to be held in perpetuity and support utility operations over the long-term. It is intended that the easements will continue to serve electricity transmission and distribution operations as electrical needs change, technology advances and improvements occur over time. The condemnation orders grant SCE sufficient rights to construct the Project within the existing right of way.

The condemnation order gives SCE the right, among other things, to construct, reconstruct, maintain, operate, enlarge, improve, and repair electric transmission lines within the right of way. The plain language of the order contemplates that the facilities within the right of way will change over time and are not "fixed" as Appellants argue. The condemnation order does not contain any restrictions on the number or voltage of the transmission lines that may be placed within the right of way and no limiting language that would support a finding of an overburdening of the easement exists therein. That the County of Ventura and surrounding neighborhoods became accustomed to the existing use of the right of way has no legal bearing.

SCE's property rights are of record, and any prudent buyer reviewing the record was put on notice that the lines and the towers could increase along this corridor through express language of the easement.

The fact that certain uses are allowed in the right of way as long as they do not interfere with SCE's rights, also does not imply that the facilities are "fixed" and cannot be modified or added to. SCE consistently evaluates secondary uses of its rights of way and either consents to uses that do not interfere with SCE's easement rights or requires clearance of encumbrances that do interfere. Contrary to Appellants assertions, secondary uses of the right of way do not ripen into prescriptive easements. California Civil Code Section 1007 provides that prescriptive rights can not be gained against property "dedicated to public use by a public utility, or dedicated to or owned by the state or any public utility."

B. The Project Will Not Cause A Substantial Adverse Change In The Significance Of A Historical Resource.

Appellants present no facts to support their claim that Exemption g. is not available because of the Project's "potential and substantial impact on historical resources". In fact, the Project will not cause a substantial adverse change in the significance of a historic resource because all known historic resources will be avoided.

As with all of SCE's projects, including those exempt from the Commission's Permit to Construct requirements, SCE complies with all applicable laws and regulations to ensure protection of the environment. In 2007, SCE contracted Compass Rose Archaeological Inc. (Compass Rose) to conduct the cultural resource assessment for the Project. As part of that task, Compass Rose conducted a record search at the South Central Coastal Information Center, conducted an intensive pedestrian archaeological survey, an extended phase I archaeological investigation, and Native American consultation.

An archival review that included all cultural resource locations and investigations recorded within a one-quarter mile radius of the Project was conducted on June 11, 2007. The

following references were searched for this review: the National Register of Historic Places, California State Historic Resources Inventory, California Historic Landmarks, and California Points of Historic Interest. Based on this record search, 28 cultural resource investigations were previously conducted and five cultural resources are recorded within the Project study area. Seventeen of the investigations cross, intersect or abut the Project survey corridor. None of the investigations encountered any evidence of prehistoric or historical cultural resources in the immediate Project vicinity. The recorded prehistoric cultural resources include four lithic scatters and a habitation site with a well developed midden deposit. All are described and depicted well outside of the Project structures and avenues of approach.

The intensive pedestrian field survey covered a 100-foot wide expanse centered on the Project line route. It included all structural locations, construction lay down areas, existing access roads and spurs and corridors. Based on the archaeological field surveys, three new archaeological resources were identified.

In order to ascertain the ability for each site to yield significant information in prehistory, Compass Rose conducted an extended phase I archaeological investigation. The investigation used shovel test pits and one meter by one meter test units to observe data potential. The phase I investigation found that only one site contained sufficient archaeological information to yield significant information in prehistory. The phase I investigation determined that a hearth feature was present within a close proximity to an existing structure and could potentially be impacted by the Project. In order to avoid impacts to this site, an Environmentally Sensitive Area (ESA) was established. The ESA was based on a series of shovel test pits that resulted in negative findings. A Native American monitor was present during all ground disturbing activities.

The Native American Heritage Commission (NAHC) was consulted on the presence of documented Native American cultural resources. A response from the NAHC was received on December 13, 2007 that failed to indicate the presence of Native American cultural resources in the immediate Project area.

The following measures will be implemented during Project construction to avoid impacts to cultural resources:

- An archaeological monitor will be on site during all ground disturbing activity in the vicinity of the 3 new archaeological resources.
- A preconstruction meeting to orient construction crews to sensitive areas is required prior to any ground disturbing activity within the vicinity of the 3 sites.
- If cultural material that may yield sensitive information is uncovered during construction then all work within a 15-meter radius of the discovery shall halt until the find can be evaluated by a qualified archaeologist. If human remains are unearthed during excavation, no further disturbance shall occur until the County Coroner has made the necessary findings as to origin and distribution pursuant to Public Resources Code Section 5097.98.
- If construction is halted because of an archaeological discovery, no work shall begin within that area until written notification from a qualified archaeologist is given to the project manager or construction foreman.
- An archaeological monitoring report is required at the end of Project construction.

As a result of implementation of SCE's avoidance and mitigation plan, the Project will not cause a substantial adverse change in the significance of a historic resource because all known historic resources will be avoided.

C. <u>SCE Did Comply With The Mandates Of GO 131-D, Section XIV.B.</u>

Appellants argue that the Commission committed "prejudicial abuse of discretion" in passing Resolution E-4243 because SCE did not incorporate the County's land use goals and concerns into the design and location of the Project. To the contrary, SCE did design and locate the Project consistent with the land use policies of Ventura County. (See September 18, 2009 Hearing Transcript pps-3-6). Appellants are really alleging that, in accordance with GO 131-D,

Section XIV.B, SCE can only construct a project if it is approved by the local agencies. Appellants misconstrue GO 131-D, Section XIV.B.

GO 131-D, Section XIV.B. states as follows:

> 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 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.

Appellants' argument completely contradicts the clarifying language of Section XIV.B: "local agencies acting pursuant to local authority are preempted from regulating . . . electric facilities constructed by public utilities subject to the Commission's jurisdiction." As CPUC Decision 94-06-014 made clear, the CPUC's overriding jurisdiction is "necessary to ensure that decisions made on the basis of strictly local concerns do not impede or impair the placement of facilities necessary for the rational development of a statewide public utility system." (D.94-06-014, p.19.)

Section XIV.B requires utilities to consult local agencies on land use matters. As set forth in the Response to Protests, SCE met and discussed the Project with the Director of the Conejo Open Space Conservation Agency on July 22, 2008, discussed the Project with the County of Ventura's Real Estate Services Manager on approximately August 29, 2008, and briefed the City of Moorpark Public Works Director on September 25, 2008, all before filing Advice Letter No. 2272-E on October 2, 2008. In addition, SCE participated in the CPUC's hearing on land use matters and met several times with the County of Ventura in an attempt to resolve the land use matters. Contrary to Appellants' assertions, SCE acted in good faith throughout these discussions and provided the additional documentation requested by Mr. Tanner, not the County, to Mr. Tanner. (See March 8, 2010 email from Mr. Thomas Burhenn to

Mr. Tanner attached as Exhibit A). Unfortunately, despite SCE's repeated explanations as to why the County's and Appellants' proposed alternatives were not feasible, the County and Appellants continued to assert they were. Despite Appellants' claims, the CPUC has the legal authority to approve Resolution E-4243.

IV.

CONCLUSION

For the reasons stated herein, Appellants' Petition for Rehearing should be dismissed.

Respectfully submitted,

BETH A. GAYLORD

/s/Beth A. Gaylord
By: Beth A. Gaylord

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April 29, 2010

EXHIBIT A

Response to your information request, re: Moorpark -Newbury Exempt Project

Thomas Burhenn to: dave 03/08/2010 10:30 AM
Bcc: Thomas Burhenn

From: Thomas Burhenn/SCE/EIX
To: dave@earsi.com
Bcc: Thomas Burhenn/SCE/EIX
History: This message has been forwarded.

Dear Mr. Tanner,

My colleagues and I enjoyed meeting with you, other community members, and Ventura County Supervisor Linda Parks on February 19th. I am writing to respond to your request for information related to the Moorpark-Newbury exempt project.

First, regarding your question about the need for a California Department of Fish & Game Streambed Alteration Agreement (1602 Permit), we have re-confirmed with our biologist that a permit is not required, since the project will not impact drainages or associated vegetation. Further, there are no other permits needed from CDFG that would require CEQA review from that agency.

Second, you asked for information about the need for project, and asked that SCE limit its response to information that SCE is allowed to make available to the public without restriction. The information listed below (and in attachments to this email) meets those conditions and is responsive to your question:

1. SCE's Reply to Protests to the Moorpark-Newbury Advice Letter (filed October 29, 2008)
2. SCE Reply to Protests to Presidential Substation Project (A. 08-12-033) (dated March 2, 2009)
3. A table SCE provided the CPUC Energy Division in July 2009, summarizing power flow data provided to the CPUC in response to their request for information about Moorpark-Newbury and the proposed Presidential Substation Project. I have not included the detailed power flow data as it is subject to federal statutes limiting its distribution unless a Nondisclosure Agreement is executed.

Lastly, you had asked for a map of "sensitive uses" along the existing SCE right of way. After conferring with SCE's land use and mapping personnel, we have determined that we do not have a map of this ROW identifying those specific uses. However, our proposed use of taller subtransmission structures and optimal phasing to reduce magnetic fields at the edge of the right of way will ensure that the entire line route, including areas where it may be adjacent to any sensitive uses, will be in full compliance with the magnetic field polices adopted by the CPUC.

If you have any further questions please contact me.

A.08-12-023 Presidential PTC_ SCE Response to Protests.pdf

SCE Reply to Protest to Advice 2272-E.pdf

MN v Pres Table Revised 7-10-09.pdf

Best regards,

Thomas A. Burhenn
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Southern California Edison

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of the **RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO APPLICATION OF ALAN AND PEGGY LUDINGTON, DANALYNN PRITZ AND DAVID J. TANNER FOR REHEARING OF RESOLUTION E-4243** on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

> Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **3rd** day of May**, 2010,** at Rosemead, California.

_/s/Meraj Rizvi_____
Meraj Rizvi
Project Analyst
SOUTHERN CALIFORNIA EDISON COMPANY

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Rosemead, California 91770

California Public Utilities Commission

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