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Decision 97-03-058 March 18, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Executive Director Resolution E-3433. Executive Order Requiring San Diego Gas & Electric Company to File an Application for a Permit-to-Construct the Proposed Batiquitos 138 kV Underground Transmission Line.	)	Application 95-12-048 (Filed December 13, 1995)

ORDER DENYING REHEARING OF DECISION (D.) 96-04-094

Pursuant to General Order (G.O.) 131-D, Section XI.B., San Diego Gas and Electric Company (SDG&E) filed Advice Letter 956-E to provide notice that the Batiquitos Project (Project) - a .7 mile 138 kV underground transmission line to be installed entirely within an existing SDG&E franchise and an existing utility easement - is exempt from G.O. 131-D's requirement that utilities must obtain permits to construct for transmission lines between 50 kV and 200 kV. A. David Puzo (Puzo), the California Alliance for Utility Safety and Education (CAUSE), and two other parties filed protests. Pursuant to G.O. 131-D, Section XIII, the Commission's Executive Director issued Executive Resolution E-3433 (Resolution), which ordered SDG&E to apply for a permit-to-construct for the Project. SDG&E filed an application for rehearing of the Resolution on the basis that the Resolution ignored the criteria prescribed by the Commission for determining whether an exemption of the permit-to-construct requirement was properly applied and whether the protests should be dismissed. Puzo and CAUSE filed responses to SDG&E's application for rehearing.

On May 19, 1996, we issued Executive Director Resolution E-3433. Executive Order Requiring San Diego Gas &

Electric Company to File an Application for a Permit-to-Construct the Proposed Batiquitos 138 kV Underground Transmission Line [Order Granting Rehearing of Executive Director Resolution E-3433 and Dismissing Protests] (D.96-04-094) (Decision) (1996) Cal.P.U.C.2d __ , which granted SDG&E's application for rehearing and dismissed the protests, finding that the Project qualifies for the exemption set forth in G.O. 131-D, Section III.B.(1)(g). Puzo and CAUSE seek rehearing of the Decision.

Puzo and CAUSE argue that the Decision errs in granting SDG&E's application for rehearing, dismissing the protests, and determining that the project qualifies for the exemption in G.O. 131-D Section III.B.(1)(g). Specifically, Puzo and CAUSE contend that the Decision: 1) violates the spirit and intent of G.O. 131-D by approving a Section III.B.(1)(g) exemption here and thus allowing SDG&E (and, in the future, other utilities) to escape virtually all active Commission regulation by upgrading their systems through under 200 kV projects in existing easements; 2) fails to require hearings as intended by G.O. 131-D, despite repeated requests; and 3) fails to require a permit to construct and thus ensure that the project incorporates the best low-cost and no-cost measures to minimize electric and magnetic fields (EMFs) within the projected benchmark guidelines in accord with the Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities [D.93-11-013] (1993) 52 Cal.P.U.C.2d 1, and and Re Rules, Procedures and Practices Applicable to Transmission Lines Not Exceeding 200 Kilovolts [D.94-06-014] (1994) 55 Cal.P.U.C.2d 87.[1]

Puzo additionally contends that the Decision: 1) ignores the primary ground advanced by Puzo in support of his protest: his contention that an exemption should not be allowed where a utility seeks to upgrade the load and function of an

1 D.94-06-014 adopted G.O. 131-D. The G.O. was subsequently modified in minor respects by D.95-08-038 __ Cal.P.U.C.2d __.

easement from that of a small neighborhood transmission line to a relatively large transmission line; 2) improperly dismisses his protest even though he had satisfied his burden with respect to stating a "valid reason to believe" that the exemption had been incorrectly applied in this case; and 3) misconstrues the determinations made in the Resolution that, due to the unique circumstances of this case, the spirit and intent of G.O. 131-D requires that SDG&E file a permit to construct.

CAUSE additionally contends that the Decision errs by failing to supply protestants with information on what criteria will result in the denial of a claimed exemption, as required by G.O. 131-D and D.94-06-014. On January 22, 1997, CAUSE submitted a supplement to its application for rehearing which argues that in finding that SDG&E's project qualifies for an exemption under G.O. 131-D, Section III.B.(1)(g), the Decision misreads the exemption by omitting the language in that section which conditions the application of that exemption on the existence of a final negative declaration or an environmental impact report (EIR) finding no significant environmental impacts.[2]

SDG&E filed a response to the applications for rehearing, which asserts that the applications for rehearing should be dismissed as mere reargument of previous positions.

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2 CAUSE should have filed its supplement to its application for rehearing within the 30 day time limit set forth in Rule 85 of the Commission's Rules of Practice and Procedure (Rules), and not 8 months later. The argument set forth in the supplement could have been made within the time limit, since it does not reference new material which was unavailable at the time the initial application for rehearing was filed. Nonetheless, because SDG&E filed on February 6, 1996 a late supplement to its December 13, 1995 application for rehearing of the Resolution, which similarly raised issues which could have been discussed in its original application, we choose to exercise our discretion under Rule 87 to permit a deviation from the Rules in "special cases and for good cause shown." CAUSE, and other parties, are hereby notified that we do not intend to make a habit of granting Rule 87 waivers to accommodate less than thorough legal research.

SDG&E also filed a supplemental response to CAUSE's supplemental pleading.

We have carefully reviewed every allegation of error raised in the applications of Puzo and CAUSE for rehearing of the Decision, and considered the responses thereto, and are of the opinion that insufficient grounds for rehearing have been shown. We will, therefore, deny the applications for rehearing. Any issues raised by the parties but not discussed in this Order are deemed denied.

ALLEGATIONS OF LEGAL ERROR

1. Alleged Procedural Improprieties

A. Absence of a Public Hearing

Puzo and CAUSE complain that by failing to hold a public hearing despite repeated requests, the Commission ignored one of the major purposes of G.O. 131-D, to respond to: "the need for public notice and an opportunity for affected parties to be heard by the Commission." (D.94-06-014, supra, 55 Cal.P.U.C.2d at 92.)

One of the major purposes of G.O. 131-D is indeed to provide public notice of proposed utility power lines and an opportunity for parties to have their concerns heard by the Commission. However, G.O. 131-D does not require public hearings in all instances in which hearings are requested.

G.O. 131-D, Section XI.B, requires utilities to provide public notice of the construction of any power line facilities or substations between 50 kV and 200 kV deemed exempt pursuant to Section III. SDG&E complied with this requirement by filing informational Advice Letter 956-E, and by mailing, posting and publishing the information required in Section XI.

G.O. 131-D, Section XII, provides for the filing of protests and requests for public hearing by those contesting the

granting of an application for a certificate of public convenience and necessity (CPCN) or a permit to construct. Such protests are to be filed in accord with the Commission's Rules of Practice and Procedure.[3] Section XII states that if the Commission, as a result of its preliminary investigation after a request for a hearing, determines that public hearings should be held, then notice shall be sent to each person who is entitled to notice or who requested a hearing.

G.O. 131-D, Section XIII, allows for the filing of protests contesting any intended construction for which a utility claims an exemption from the requirement for a permit to construct. Puzo and CAUSE exercised their rights under this section. Section XIII requires the Executive Director, after consulting with Commission staff, to issue an Executive Resolution determining whether the utility is to file an application for a permit to construct and whether a protest is dismissed for failure to state a valid reason to believe that an exemption has been applied incorrectly or that an exception to an exemption exists. Unlike Section XII, Section XIII does not state that protestants may request public hearings and that such requests will be evaluated by the Commission after its preliminary investigation. Thus, those protesting claimed exemptions have a less formal opportunity to seek a public hearing than do those objecting to the granting of an application for a permit to construct. Certainly, there is nothing in Section XIII to support a claim that we are required to hold a public hearing simply because a hearing is requested by one protesting a utility's exemption claim.

3 The Rules do not guarantee an evidentiary hearing to address each protest filed. Rule 44.4 states that: "The filing of a protest does not insure that an evidentiary hearing will be held. The decision whether or not to hold an evidentiary hearing will be based on the content of the protest. The Commission may also calendar matters for hearing on its own motion."

The absence of a public evidentiary hearing does not mean that we have ignored the protests of Puzo and CAUSE. Puzo and CAUSE have presented their views pursuant to G.O. 131-D, Section XIII, and have had those views considered, or "heard," both by the Executive Director and by the Commission itself. While Puzo and CAUSE may wish we would reach a different result, they can hardly complain that we have not considered their arguments. Our decision to not hold a public hearing in this proceeding is not legal error.

B. Absence of Criteria for G.O. 131-D Exemptions

CAUSE notes that D.94-06-014, supra, states that: "We agree with DRA (Division of Ratepayer Advocates (now, Office of Ratepayer Advocates)]. The public needs to be supplied with information on what criteria will, or will not, result in the denial of a claimed exemption from the permit-to-construct requirement ... " (55 Cal.P.U.C.2d at 108). CAUSE then argues that such information was apparently not developed pursuant to D.94-06-014, and in any case was not supplied to the protestants pursuant to D.94-06-014 and G.O. 131-D.

CAUSE misunderstands the quoted language from D.94-06-014. In the proceeding leading to D.94-06-014, utilities expressed concern that proposed project notice requirements could cause routine protests that could delay project completion, and asked us to provide guidance to the public by providing written criteria as to what constitutes a valid protest that could lead to a decision requiring a utility to file an application for a permit to construct. DRA shared the utilities' concern to some extent, but felt that record was then insufficient to make such judgments. (Id.) DRA believed that, over time, a record would accumulate regarding what we determined to be sufficient reasons for requiring permits to construct. DRA requested that the Public Advisor's Office maintain a file of environmental impact reasons identified in protests, and our disposition of such

protests. DRA also requested that the utilities be required to include in their project notices a statement that such information is on file with the Commission and available to the public.

In response, we stated in D.94-06-014 that:

> We agree with DRA. The public needs to be supplied with information on what criteria will, or will not, result in the denial of a claimed exemption from the permit requirement and trigger a permit-to-construct requirement or a hearing. Therefore, we will require the utilities, in their notices of proposed construction, to describe how to contact the Public Advisor and inform the public that this office will provide information to assist in submitting a protest. To ensure consistency in the content of notices, we have specified certain information elements which must be included and will develop a compliant standard notice in consultation, and to be approved by, the Public Advisor and CACD prior to use." (Id.; see also, G.O. 131-D, Section XI.C.)

We followed this notice specification with a description of the informational advice letter filing system, protest process, and review procedure to be used to evaluate utility notices of proposed construction. (Id.; see also, G.O. 131-D, Sections XI, XII, and XIII.) D.94-06-014 establishes the process implemented in this current proceeding:

> Within 30 days after the date the protest is submitted and the utility has submitted its response, the Executive Director, after consulting with CACD, shall issue an Executive Resolution stating whether the utility is to submit an application for a permit to construct, or the protest is dismissed for failure to state a valid reason. Also, the Executive Director shall state the reasons for granting or denying the protest and provide the Commission's Public Advisor with a copy of each such Executive Resolution; providing the basis for such a determination will facilitate the development of a file for the use of the public." (Id.;

see also, G.O. 131-D, Sections XI, XII, and XIII.)

The current protest, Executive Resolution, and Decision are themselves part of the D.94-06-014 mandated guidance as to what constitutes a valid protest. D.94-06-014 directs that utilities notify the public of their right to protest and of the availability of the Public Advisor's Office to assist in filing such protests, and orders the Public Advisor's Office to maintain a file of protests and Executive Resolutions addressing such protests. However, since the protests in this proceeding are among the first protests concerning alleged failures to comply with G.O. 131-D, there are few Executive Resolutions concerning G.O. 131-D. Thus, there has been little we could offer as guidance concerning the manner in which we will resolve such protests. This failure to provide non-existent information is not legal error.

C. Dismissal of Protests

Puzo argues that we erred in dismissing his protest, since he had a subjective "valid reason to believe" that an exemption had been incorrectly applied by a utility. Puzo cites language in the Resolution rejecting SDG&E's view that the narrow issue to be decided by the Executive Director is whether a protestant states a valid reason to believe the utility incorrectly applied for an exemption, on the ground that this approach implies that the Executive Director, rather than the protestor, is the first judge of validity. The Resolution concludes that this interpretation places too great a burden on protestants, and that all that is required is that the protestant "have a valid reason to believe ... the utility has incorrectly applied an exemption" and that "the validity is in the mind of the protestant, and it is reasonable to accept that the act of filing a protest is based upon assumed validity." (Resolution at 7). Puzo claims that G.O. 131-D Section XIII is, at the very

least, vague and ambiguous with respect to whether a subjective or objection standard is to be used in determining whether a "valid reason to believe" has been stated. Puzo asserts that protestants should be given the benefit of the doubt as to whether a proper protest has been submitted.

Puzo misses the point of G.O. 131-D, Section XIII. Section XIII provides in part that those who are given notice under Section XI.B and any other person or entity entitled to participate in a proceeding for a permit to construct "may ... contest any intended construction for which exemption is claimed ... if such persons ... have valid reason to believe that (any of the Section III.B.2 exceptions apply) or the utility has incorrectly applied for an exemption...." For the purpose of determining whether a person or entity has the right to contest any intended construction, it is sufficient that the person or entity have a subjective reason to believe either that an exception to a claimed exemption exists or that the utility incorrectly applied the exemption.

The right to contest a utility's claimed exemption is, of course, not the same as the right to win the contest regarding the validity of the claimed exemption. Section XIII goes on to state unambiguously that:

> "Within 30 days after the utility has submitted its response, the Executive Director, after consulting with CACD, shall issue an Executive Resolution on whether: the utility is to file an application for a permit to construct, or the protest is dismissed for failure to state a valid reason." (Emphasis added.)[4]

Once a protest is filed, and the protest and the

[4] Even the Resolution recognizes that "a protest may be dismissed for 'failure to state a valid reason' (Section XIII)." (Resolution at 7.)

utility's response thereto are reviewed by the Executive Director and Commission staff, the protest may be dismissed if it fails to state a valid reason, even if the protestor retains its initial subjective belief that its reasons for protesting are valid.

In other words, a subjective belief is sufficient to surmount an effort by a utility to have a protest dismissed before it is considered by the Commission, but is not sufficient to compel an ultimate ruling in the protestor's favor. If Puzo's interpretation of G.O. 131-D, Section XIII, were correct, the mere fact that a protestor had a subjective belief that it was right would compel the Executive Director to require an application for a permit to construct every time someone protested a utility's asserted exemption. Such an approach would render meaningless the Executive Director review process set forth in Section XIII. We did not err in considering Puzo's protest and then dismissing it.

2. Alleged Substantive Errors

A. G.O. 131-D, Section III.B.(1)(g)

G.O. 131-D, Section III.B.(1)(g), states that:

> "1. Compliance with Section IX.B (permit to construct requirement) is not required for:
>
> g. power line facilities or substations to be located in an existing franchise, road-widening setback easement, or public utility easement; or in a utility corridor designated, precisely mapped and officially adopted pursuant to law by federal, state, or local agencies for which a final Negative Declaration or EIR finds no significant unavoidable environmental impacts."

The Resolution finds that: "The proposed power line is to be located wholly within utility rights-of-way and franchise

areas." (Resolution at 9 (Finding 3); see also, 6.) Notwithstanding this finding, the Resolution determined that a literal application of the Section III.B.(1)(g) exemption violated the intent and spirit of G.O. 131-D. The Resolution finds that since one purpose of G.O. 131-D is to be responsive to the need for public notice and an opportunity for parties to be heard by the Commission, the EMF concerns of the protestants are sufficient to warrant an application for a permit to construct,even though SDG&E provided notice and the parties provided comments.[5] The Resolution states that "we intend to limit the scope of our review to the development of EMF issues and the comparison of alternatives to the extent it is germane to the EMF issue." (Id., at 6.) Puzo complains that the Decision fails to recognize that his protest is centered upon the argument that SDG&E has improperly applied the exemption, and not on the environmental concerns and EMF issues he raised in this case. Puzo contends that while the Resolution adopted the view of protestants that a literal interpretation of the exemption violates the intent and spirit of G.O. 131-D, the Decision completely ignores the issue of whether the exemption was correctly applied in the first place. Puzo argues that the exemption should not be allowed where a utility seeks to upgrade the load and function of a small neighborhood distribution line to a relatively large transmission line.

Puzo notes that the Decision states that "we find no evidence that any of the exceptions outlined in Section III.B.2.(a), (b) and (c) have been shown," and expresses our

5 The Resolution expresses sympathy and partial agreement with SDG&E's literal interpretation of G.O. 131-D, stating that: "There is no denying that the proposed project is to be entirely within utility rights-of-way and franchise areas. We reject "cumulative impacts" arguments relating vaguely to future growth. We also reject arguments relating to degradation of open space by, for example, the installation of a riser pole in the existing transmission corridor." (Resolution at 6.)

disagreement with the Resolution's reasoning that EMF concerns make it unnecessary to decide whether or not the protestants stated valid reasons to believe that there are exceptions to the exemption. (Decision at 4.) Puzo contends that the Decision may misread, and thus incorrectly disagree with, Resolution Finding 17, which states that: "It is not necessary to decide whether or not the protestants stated valid reasons to believe that there are 'exceptions to the exemption' under Section III.B.2.b. and c." (Quotes in original.) Puzo claims that Finding 17 is correct in stating that a review of potential exceptions is not necessary, since the Resolution finds that the exemption was applied incorrectly.

CAUSE also complains that the Decision improperly approved SDG&E's use of the relevant exemption, but for different reasons. CAUSE reads the exemption to apply to projects within utility easements only when those projects have been the subject of a negative declaration or EIR. CAUSE contends that the Decision fails to recognize that the phrase "... for which a final negative declaration or EIR finds no significant unavoidable environmental impacts" applies both to those project sites described before the semi-colon following the phrase "public utility easement" and to those sites described after the semi-colon as project sites within a "utility corridor...." In CAUSE's view, <u>all</u> of the project sites listed in (g), not just sites in utility corridors, must meet the negative impact qualification in order to be exempt from the permit to construct requirement.

Contrary to the positions taken by Puzo and CAUSE and adopted in the Resolution, the literal language of G.O. 131-D reflects our intent. The language of GO 131-D is consistent with the intent expressed in D.94-06-014, the decision in which we adopted G.O. 131-D. The Resolution errs in blurring the distinction between a finding that an exemption does not apply, and a finding that, although an exemption applies, a permit to construct is still required because the project falls within an

exception to an exemption. This error led to a decision which consciously disregards the actual language of G.O. 131-D, Section III.B.(1)(g), and the fact that the Project falls squarely within the exemption set forth in Section III.B.(1)(g), in favor of an analysis that appears to use certain aspects of the exception criteria in Section III.B.2. to create a unique "non-literal" reading of the G.O.

Although the Resolution states that it is not necessary to determine whether an exception to the exemption applied, the Resolution highlights the EMF concerns Puzo and CAUSE raised in their arguments that the Batiquitos project fell within one of the exceptions to the exemptions. For example, the Resolution states that:

> "The protestants cite various reasons for believing that there are exceptions to the exemption under Section III. B. 2. b. and c., which generally are referred to as the 'cumulative Impacts' and 'unusual circumstances' exceptions. It is not necessary to examine each and to make fine distinctions among the reasons. It is sufficient to say that we agree with Whittington that the construction of a 12-duct bank with only three to be used for this project is suggestive of 'cumulative impacts,' particularly when joined with Puzo's concern about the 'cumulative impacts' of increased EMFs... We agree with CAUSE that this project is sufficiently unique that EMF issues should be resolved for it specifically based on our EMF policy set forth in D.93-11-013. The uniqueness will be discussed later..." (Id. at 7 (emphasis in original).)
>
> "As we said earlier, we agree in part with SDG&E's claim of exemption and we intend to limit our review to EMF issues.
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> "There are several things which make this project unique. Foremost is the undergrounding of a 138kV power line in a residential area. Another is the potential for other high voltage power lines in the same duct bank, even though SDG&E plans no

> additions at this time. The concentration of transmission lines in the vicinity also makes the project unique, although we recognize that the transmission corridors preceded the residential development. Another unique feature is the availability of alternative locations.
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> "Given the current concern regarding EMFs and in light of D.93-11-013, it is reasonable to interpret the intent of GO 131-D to require a Permit-to-Construct under the the specific facts of this situation. It is not necessary to decide whether or not the protestants stated valid reasons to believe that there are 'exceptions to the exemption' under Section III. B. 2. b. and c." (Id. at 8; see also, 10, at which the last quoted sentence is repeated as Finding 17.)

Reading the above-quoted material as a whole, it appears as if Finding 17 was a somewhat ambiguous way of repeating the earlier sentiment that it was not necessary to perform a detailed analysis of which exception applied - the cumulative impact exception (b) or the unusual circumstances exception (c).

A more straightforward approach is to acknowledge that the project "literally" qualifies for an exemption, and then analyze whether an exception to the exemption applies. A finding that an exception to an exemption applies would have the same end result as a finding that an exemption does not apply in the first place.

Following this approach, it is evident that while the Executive Director found that the protestants' EMF concerns justified a finding that the project was unique enough to require an application to construct, even though the Project would otherwise qualify for a Section III.B.(1)(g) exemption, we did not. The Decision states quite clearly that:

> "Concern about possible EMF exposure resulting from a project is not sufficient basis for finding that an exception under Section III.B.2(a),(b), or (c) exists. To find otherwise would be to render meaningless the Section III.B.1(g) exemption for

> powerline facilities to be located in an existing franchise or public utility easement because it can be argued that all powerline facilities or substations have the potential for generating EMFs. In creating G.O. 131-D it was not our intention to create a procedure that could be used to require a utility to go through an environmental review solely to address concerns about potential exposure to electric and magnetic fields generated by a proposed facility." (Decision at 4-5.)

We did not err by rejecting the Resolution's reasoning that it was not necessary to review the applicability of the "exceptions to exemptions," or by adopting the straightforward approach outlined above.

Nor did we err by not adopting CAUSE's ungrammatical reading of G.O. 131-D, Section III.B.(1)(g). Section III. B.(1)(g) and D.94-06-014, supra, which adopted G.O. 131-D, support the Decision's interpretation of G.O. 131-D. First, Section III. B.(1)(g) states in pertinent part that:

> "1. Compliance with Section IX.B [permit to construct requirement] is not required for:
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> g. power line facilities or substations to be located in an existing franchise, road-widening setback easement, or public utility easement; or in a utility corridor ... for which a final Negative Declaration or EIR finds no significant unavoidable environmental impacts." (Emphasis added.)

The semicolon, followed by the word "or," divides the potential locations of facilities listed in this section into two categories: 1) existing franchises, road-widening setback easements, or public utility easements; and 2) utility corridors officially adopted pursuant to law by federal, state, or local agencies for which a final negative declaration or EIR finds no significant unavoidable environmental impacts. CAUSE would have

us ignore the "or," and treat Section III.B.(1)(g) as containing but a single list, with all elements of the list being subject to the CEQA requirements. D.94-06-014, supra, however, explains separately the rationale for each category.

> "We believe that it is appropriate to provide an exemption for projects that are to be constructed within franchises, approved corridors, or in connection with broader actions that have been approved in accordance with CEQA. Once a government agency has reviewed the placement of utility facilities pursuant to CEQA, we see no reason for the Commission to duplicate that effort.
>
> The obvious rationale for this exemption is that franchise areas in which the power lines are to be installed are already improved and the original environment disturbed by virtue of the construction of the streets and associated public uses such as curbs, gutters, sidewalks, sewer, and other facilities. In other words, locating a power line in a franchise is not the same as locating a power line in virgin territory. Therefore, we believe that this exemption is logical since these locations are either already disturbed areas containing significant public improvements or have been designated by the local jurisdiction as areas for public improvements. As with the exemption proposed for projects which as part of a broader action, CEQA review of a plan for the location of utilities does not guarantee that the significant environmental impacts associated with the power line or substation can be effectively mitigated by the reviewing agency. Therefore, we will adopt a similar limitation here. (D.94-06-014, supra, 55 Cal.P.U.C.2d 87, 106 (Emphasis added.))

The text of D.94-06-014 makes clear that there is one rationale for exempting the potential locations listed before the semi-colon in Section III.B.(1)(g), and a separate rationale for the exemption for locations listed after the semicolon. Thus, the exemption makes sense for the first list of potential power

line locations since the area in which the lines are to be located has already been disturbed. The exemption makes sense for the second list of locations - approved utility corridors - because a governmental unit has already undertaken CEQA review of the potential location and it would be wasteful for the Commission to duplicate that effort.

CAUSE's quotation from the "summary" section of D.94-06-014 does not aid its cause. The quoted sentence - "Certain types of activities are exempted from the permit-to-construct requirement, such as: minor replacement, relocation or modification of existing powerlines; improvements within existing substation boundaries; lines to be relocated or constructed as part of a larger project with CEQA review; and lines to be located in compliance with a local plan" (id., 55 Cal.P.U.C.2d at 92) - shows that the class of activities described as "lines to be relocated or constructed as part of a larger project with CEQA review" is but one class of activities on a list in which a number of classes of activities are separated by semicolons. Each item on the list is distinct from the other items on the list. There is no reason to apply the "CEQA review" element of one class of activities to the activities listed in each other class.

2. Executive Resolution E-3420

In its supplemental filing, CAUSE directs our attention to Executive Resolution E-3420, which was attached to SDG&E's supplement to its application for rehearing of Executive Director Resolution E-3433. Resolution E-3420 addressed Pacific Gas and Electric Company's (PG&E) Quail Lake project, for which PG&E relied upon the exemption in G.O. 131-D, Section III.B.(1)(f), for projects that are part of a larger project which has previously undergone environmental review and for which a negative declaration or an EIR has been issued showing no

significant unavoidable impacts. CAUSE claims that Resolution E-3420 buttresses CAUSE's argument that a negative declaration or an EIR finding is required for an exemption. E-3420 found that the project in question, a 155 kV line, was exempt because: (a) it was part of a larger project, and (b) a certified and approved Final Environmental Impact Report was issued.

E-3420 further states:

> "10. GO 131-D specifies two bases for sustaining a protest of an informational advice letter: (1) the utility incorrectly applied a GO 131-D exemption, or (2) there exists under CEQA a certain exception to a categorical exemption.
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> 11. The protestant does not assert that the utility incorrectly applied a GO 131-D exemption or that categorical exemptions under CEQA are a factor.
>
> 12. CACD concludes that PG&E applied the GO 131-D exemption correctly, being that the relocation project is part of a larger project for which an EIR was certified and adopted and the relocation project was addressed in the EIR."

CAUSE argues that we should grant its application for rehearing since, unlike the situation in the proceeding leading to E-3420, CAUSE does assert that SDG&E has incorrectly applied a G.O. 131-D exemption.

The problem with CAUSE's argument is that while CAUSE correctly notes that the E-3420 proceeding involved a different fact pattern than the current proceeding, this difference alone does not mean that CAUSE should prevail here. The question is not whether the facts in both proceedings are similar, but rather whether G.O. 131-D has been properly applied to the facts in the current proceeding. Resolution E-3420 is not helpful in resolving this question.

In essence, Resolution E-3420 stands for the undisputed proposition that when a relocation project is part of a larger

project for which a negative declaration or an EIR is required, and a final CEQA document finds no significant unavoidable environmental impacts caused by the proposed power line, then the project is exempt from the requirement for a permit-to-construct. (See, G.O. 131-D, Section III.B.(1)(f).) Since the project in question here is not part of a larger project for which CEQA review is required, Resolution E-3420 is not particularly relevant. CAUSE's reference to Resolution E-3420 does not demonstrate legal error.

3. Electric and Magnetic Field Mitigation Requirements

CAUSE complains that the Decision fails to apply the D.93-11-013 requirement that:

> "For new and upgraded facilities (facilities requiring certification as contemplated in General order (G.O.) 131 [footnote 6: Under the proposed revisions our authority over new transmission lines would extend to lines 50 kv and above], we direct that low-cost options shall be implemented to the extent approved through the project certification process; no-cost mitigation measures should be undertaken until further notice. Absent testimony which conclusively demonstrates that exposure from electric utility EMF causes health risks, we will continue to follow the EMF policy established in the Kramer-Victor transmission line decision. [Footnote 7: D.90-09-059 (1990) 37 Cal.P.U.C.2d 413, 453] That policy provides that remedies applied to reduce human exposure to EMF must be determined within the constraints of each new construction project." (Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities [D.93-11-013] (1993) 52 Cal.P.U.C.2d 1, 9.)

CAUSE and Puzo note that D.94-06-014 states that: "As we required in Ordering Paragraph 6 of D.93-11-013, the utility's EMF mitigation measures shall be evaluated and addressed during

the GO-131 certification process," (55 Cal.P.U.C.2d at 100.) CAUSE then argues that D.93-11-013 clearly states that G.O. 131-D intends to incorporate EMF policy as established in that decision and the Kramer-Victor transmission line decision, and that by exempting the Project from the "project certification process" we not only fail to apply existing EMF policy, but also create a precedent that would allow the construction of virtually all lines between 50 and 200 kV without going through this project certification process since utilities would be able to use existing rights of way or franchises for nearly all projects. CAUSE and Puzo claim this was not the intent of D.94-06-014 and G.O. 131-D.

CAUSE notes that there were no previous requirements for this "project certification process" for power lines between 50 and 200 kV, and that G.O. 131-D effectively preempted local regulatory authority over such power lines. In essence, CAUSE contends that the Decision interprets a general order designed to increase our regulation of power lines between 50 and 200 kV in a manner which results in an overall decrease in the regulation of such power lines, and thus makes a mockery of the purpose of the general order.

CAUSE and Puzo are simply wrong. The Decision does not abrogate or sidestep the requirements of D.93-11-013, supra, that utilities undertake no and low-cost measures to reduce EMFs. Nor does the Decision eliminate the G.O. 131-D, Section XI.B, requirement that utilities must give notice of the proposed construction of any power line facilities or substations between 50 kV and 200 kV deemed exempt pursuant to Section III, or the Section XI.C.(3) requirement that such notices must include: "A summary of the measures taken or proposed by the utility to reduce the potential exposure to electric and magnetic fields generated by the proposed facilities, in compliance with Commission order."

If a person or entity believes that the Section XI.C.(3) notice indicates that the proposed EMF reduction

measures will not comply with the requirements of D.93-11-013, it may so note in any protest to require the utility to file an application for a permit to construct. And, if the person or entity believes that the actual measures taken by the utility violate the requirements of D.93-11-013, it may file a complaint alleging the failure of the utility to comply with one of our orders or decisions.

Our decision to not require a permit to construct for the Project should have no significant impact on the implementation of EMF reduction measures required by prior decisions. The absence of a permit to construct requirement in this proceeding is not evidence of legal error.

THEREFORE, IT IS ORDERED THAT:

1. The applications of Puzo and CAUSE for rehearing of the Decision are denied, since no legal error has been demonstrated.
2. This order is effective today.

Dated March 18, 1997 at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners