

Memorandum

Date: June 29, 2007

File #: GO 131-D and GO 96-B

To: Chloe Lukins, CPUC

From: David Kraska and [Redacted]

Subject: Whether GO 96-B applies to advice letters filed under GO 131-D.



ISSUE:

Through General Order (GO) 131-D, the California Public Utilities Commission (CPUC or Commission) authorizes the construction of investor-owned utility line and substation projects. Section III.B.1 of GO 131-D exempts certain construction project from formal permit requirements, but requires prior notice and the filing of an informational advice letter. Newly adopted GO 96-B provides general rules for filing and approval of advice letters not governed by “statute or other Commission orders.” Does GO 96-B apply to GO 131-D advice letter filings?

CONCLUSION:

No. By its own terms, GO 96-B does not apply when other processes or timelines have been established by other statutes or Commission orders. GO 131-D sets forth its own processes and timelines under Sections III.B.1 and XI.B. Furthermore, GO 131-D requires the filing of an informational advice letter that does not require Commission approval; GO 96-B applies to advice letters that require some form of Commission action.

DISCUSSION

A. General Order 131-D Authorizes No Commission or Staff Approval On Exempt Projects That Are Not Protested

General Order (GO) 131-D exempts certain electric utility construction projects from the CPUC’s formal permitting requirements under Sections III.A (over 200 kV) and III.B.1 (under 200 kV). Sections III.B and B.1 provide that projects falling within the listed exemptions do not require a permit to construct before beginning construction, but that “notice of the proposed construction [unless it is statutorily or categorically exempt from CEQA] . . . must be made in compliance with Section XI.B herein.” Section III.B.1 states: “*If a protest of the construction of facilities claimed by the utility to be exempt from compliance with Section IX.B is timely filed pursuant to Section XIII, construction may not commence until the Executive Director or Commission has issued a final determination.*” Section XIII, which relates solely to protests, reiterates that “[c]onstruction shall not commence until the Executive Director has issued an Executive Resolution [within 30 days].” GO 131-D does not otherwise prohibit construction as long as sufficient notice is provided under Section XI.B.

Section XI.B requires notice “not less than 30 days before the date when construction is intended to begin” and the first newspaper publication “not later than 45 days before the date when construction is intended to begin.” Notice must be mailed to certain governmental entities and an “informational” advice letter filed with the CPUC. As a practical matter, since first publication generally is at the same time as posting of the notice and filing of the advice letter, construction can begin as intended after 45 days unless a protest is filed (which triggers the provisions above prohibiting construction until the Commission acts) or the Commission on its own motion questions the applicability of the exemptions (equivalent to a protest with the same result). There is no provision in GO 131-D for a “suspension” that would automatically delay construction in the absence of a protest.

Nothing in GO 131-D directs the CPUC to issue any approval on a notice that is not protested. GO 131-D does not require the CPUC to issue “effective date” letters, and does not prohibit construction before the CPUC issues a letter confirming the “effective date.” Although the CPUC has generally issued these letters, and they are sometimes helpful in other contexts, they are not part of the GO 131-D requirements. The CPUC’s decision adopting GO 131-D made clear that the Commission did not intend its staff to “approve” the GO 131-D advice letters:

For activities falling within these [Section III.B.1] exemptions, the utilities are not required to obtain a permit to construct *or any other approval from this Commission.* (D.96-06-014, at 34 (emphasis added).)

The Commission explained:

Strictly speaking, these are not exemptions from any existing or proposed requirements. Rather, these are activities which we do not include under our active regulation at this time. Thus, these activities retain their current status of being *outside of our active regulation.* (*Id.* (emphasis added).)

Although section XI.B.4 of GO 131-D requires the filing of an informational advice letter “in accordance with GO 96-A,” GO 96-A (unlike its successor, GO 96-B) provided that advice letters were effective automatically unless protested or suspended. (GO 96-A, Section V.A.)¹ Of course, section XI.B.4’s use of the term “informational” advice letter

¹ GO 96-A addressed the filing of advice letters for tariff sheets that did not increase rates or charges, for very minor rate increases, or for increases authorized by a previous Commission decision. (*See* GO 96-A, sections V and VI.) The tariff proposed in those advice letters became effective automatically 40 days after filing “unless suspended by the

further confirms that GO 131-D’s advice letter was not intended to need Commission “approval.”

The fact that the General Order does not prohibit construction of exempt projects that are not protested reflects the Commission’s decision that exempt projects require only a pre-construction notice, not Commission approval. The certainty provided by GO 131-D’s notice process is essential to the California Independent Systems Operator (CAISO) and investor-owned utilities as they plan the grid, maintain reliable service, and respond to rapid development. Knowing that construction can begin 45 days after notice allows the utilities to plan their work around seasonal restrictions and limited CAISO clearance windows, and in coordination with the local development that is often associated with transmission projects requested by third-parties as part of larger projects under Section III.B.1(f). In GO 131-D, the Commission implicitly recognized that all such projects require a notice process that provides tight time frames for public comment, automatic authority to construct in the absence of any protests, and prompt action to resolve any protests that are filed.

B. General Order 96-B Applies To Advice Letters Requiring Commission Action, Not To General Order 131-D Advice Letters

GO 96-B sets comprehensive new rules for the contents, review and disposition of certain advice letters, establishing a 3-tier system for disposing of advice letters that is based on Public Utilities Code § 455. (D.07-01-024, at 6.) Section 455 governs tariff changes, and authorizes the Commission to investigate and, if need be, to suspend proposed tariff changes. (Id., at 6-7.) There is no similar code provision for GO 131-D filings, although – as stated above – the Commission can protest a filing on its own motion.

GO 96-B proposes to apply the timelines derived from Section 455 to “essentially all advice letters” *except* “those few advice letters for which a different process or timeline is specified by statute or other Commission order.” (D.07-01-024, at 7; *see also* GO 96-B, section 7.3.1.) Thus, GO 96-B sets up a system for dealing with advice letters *that do not otherwise have a process specified by statute or order*. Advice letters required under GO 131-D, by contrast, clearly involve a different process and timelines as set forth in Sections III.B.1 and XI.B.

GO 96-B establishes 3 tiers, and requires that each advice letter identify the tier that it is being filed under. According to the Commission, through tiering, the GO separates advice

Commission either upon complaint or its own motion.” (GO 96-A, section V.A; *see gen’ly* sections III and IV (regarding rules for submission of tariff sheets and advice letter procedures).)

letters into two broad groups: those requiring staff disposition, where approval or rejection is ministerial (Tiers 1 and 2), and those requiring Commission resolution, where approval or rejection is discretionary (Tier 3). (D.07-01-024, at 8-9.) Tier 1 applies to minor, non-controversial approvals by CPUC staff, which are “effective pending disposition” – that is, effective immediately upon filing, but subject to subsequent regulatory approval and, if necessary, reversal. (*Id.* at 11-14; GO 96-B, section 7.3.3.) Tier 2 advice letters do not become effective until approved, but are automatically deemed approved after 30 days unless suspended. (*Id.* at 19-21; section 7.3.4.) Tier 3 advice letters require Commission action and will not be deemed approved. (*Id.* at 21; section 7.3.5.) Significantly, all advice letters processed under GO 96-B require Commission “approval” of some kind, whether ministerial or discretionary, and whether by staff or Commission.

As explained in Part 1 above, GO 131-D advice letters are different; they are informational only and do not require any approval by the Commission unless there is a protest or Commission inquiry. Moreover, because GO 131-D sets up a different process and timelines, GO 131-D advice letters are not governed by the timelines or tier structure in GO 96-B – as GO 96-B expressly states.

Logic dictates this result, since utility construction projects are not like tariff changes, which can be suspended or changed after the fact. Once a construction project begins, it cannot easily be undone. Moreover, construction projects must be planned, engineered and mobilized – all by a date certain so that the CAISO and investor-owned utilities, working together, are able to maintain system reliability. Re-interpreting GO 131-D to require Commission staff review and approval of unprotested 131-D advice letters would not only be contrary to the terms of the general orders, it would also compromise utilities’ ability to timely complete needed projects.