LAW OFFICES OF

PRITZ & ASSOCIATES

3625 East Thousand Oaks Boulevard, Suite 176
WESTLAKE VILLAGE, CALIFORNIA 91362

DANALYNN PRITZ
KURT J. PRITZ
GERALD L. MARCUS, Of Counsel

TELEPHONE: (805) 496-8336
FACSIMILE: (805) 496-8226

June 8, 2009

Filed Electronically
By Email: fly@cpuc.ca.gov and ***jm4@cpuc.ca.gov***

Messrs. Michael Rasauser and Jack Mulligan
Energy Division and Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

Re: Comments / Objections to Draft Resolution No. E-4243
Affirming Executive Director's Action Resolution E-4225
Advice Letter 2272-E. Filed on October 2, 2008.

To The Honorable Members of the Public Utilities Commission:

This Commission should be alarmed by the fact that every single city, county, and unincorporated area affected by this project, including well over 100 residents thereof, have objected to this project. It should also have grave concerns about the Draft Resolution it has before it, which essentially does no more than endorse each and every unsubstantiated assertion of the Southern California Edison Company ("SCE"), while paying only lip-service to the many potentially significant environmental impacts identified by the community. It is as if SCE itself wrote the Draft Resolution itself. This Commission should reject the Draft Resolution, require SCE to obtain a permit to construct ("PTC") and, consistent with the public policy of the State of California, demand that this massive project be subjected to environmental scrutiny.

The Resolution erroneously accepts every SCE assertion at face value while the community's environmental concerns, and the opinions of CEQA *expert* Mr. David Tanner, are rejected out of hand or not considered at all. Under CEQA, Staff is not empowered to determine whether impacts are significant or avoidable. All an initial study by Staff can do is determine if there *are impacts*. They are not to decide whether the extent of an impact is "reasonable" or that there is *no* potential significant impact to the environment. The SCE documents and the Draft Resolution describe hundreds of significant and unavoidable

impacts which the Staff have improperly taken upon itself to analyze, discuss, and "resolve" by dismissing them *all* as exempt, without exception. Only a PTC or an environmental impact report ("EIR") can tell us if sections of this massive project could be designed to mitigate its impacts, by preserving wildlife corridors, focusing access for servicing and maintenance, minimizing fire dangers or under-grounding sections near residents to restore or improve viewsheds. The Staff has improperly made these determinations without any substantial evidence. This Commission cannot endorse this transparently flawed resolution. This Commission needs *evidence*, proof beyond the word of the corporation this Commission is charged with regulating.

SCE has not provided substantial evidence to support the Staff's conclusion that this project will have *absolutely no* potentially significant impact on the environment. In most instances, SCE has provided nothing more than a blanket denial of the allegations. (See Cal. Code Regs., tit. 14[1], § 15064, subd. (f) ["The decision as to whether a project may have one or more significant effects shall be based on substantial evidence in the record of the lead agency"]; *ibid.* at subd. (f)(5) [*argument*, speculation, *or unsubstantiated opinion* shall *not* constitute substantial evidence].)

The community, on the other hand, has presented substantial evidence, including the opinion of a qualified CEQA expert, Mr. David Tanner, whose opinions were *uncontroverted*.[2] (Guidelines, § 15064, subd. (f)(5) [substantial

---

[1] CEQA's implementing regulations, the Guidelines, are found in California Code of Regulations, title 14, section 15000 et sequittur. All subsequent regulatory citations to the Guidelines are to title 14 of the Code of Regulations.

[2] Our facts and legal positions have been throughly argued and the specific arguments will not be repeated herein. The documents are on file with the CPUC and I incorporate by this reference, inter alia, my original protest letter dated October 21, 2008, my reply to SCE's response to the protest letters, dated November 17, 2008, with attachments, and my Appeal of Executive Director Action Resolution No. E-4225, dated March 25, 2009, with all supporting exhibits and attachments, including, without limitation, the 23-page analysis prepared by CEQA expert David Tanner.

evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts].)

"CEQA Guidelines, which implement the provisions of CEQA, define 'substantial evidence' as 'enough relevant information and reasonable inferences from this information that a *fair argument* can be made to support a conclusion, *even though other conclusions might also be reached.*' (Guidelines, § 15384, subd. (a).)" (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1226, italics added.) The community has presented substantial evidence to *support a fair argument* that the project may have a significant effect on the environment, requiring environmental review under CEQA. (See e.g., *Pocket Protectors v. City Of Sacramento* (2004) 124 Cal.App.4th 903, 908.)

Under the California Supreme Court decision in *Laurel Heights Improvement Assn. v. Regents of University of California* (1998) 47 Cal.3d 376, the standard is whether the project "may have" a potential substantial effect on the environment. This is a *much lower threshold* than the one employed in the Resolution. The community does not have the burden to prove SCE's conclusions are flawed or that their position wins out over SCE's position. The community has the burden to present substantial evidence to *support a fair argument* that the project *may have* a significant effect on the environment. The community has met its burden.

Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument. (*Ocean View Estates Homeowner's Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402,; *Arviv Enterprises, Inc. v. South Valley Area Planning Com.* (2002) 101 Cal.App.4th 1333, 1347.) So may expert opinion if supported by facts, even if not based on specific observations as to the site under review. (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1398-1399 [expert testimony for fair argument purposes need not meet standard required of such testimony at trial].) And, even assuming, without conceding, that SCE's denials or assertions are "expert opinions," when there is controversy among the experts this, in and of itself, is a ground for requiring CEQA review. (See Guidelines, § 15064, subd. (f)(1) ["if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency *shall* prepare an EIR, *even though it may also be presented with*

other substantial evidence that the project will not have a significant effect"], italics added.)

California Code of Regulations, title 14, section 15064, subdivision (g) states that: "After application of the principles set forth above in Section 15064(f), and in marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency *shall* be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, *the Lead Agency shall treat the effect as significant and shall prepare an EIR.*" (Italics added; see also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75 [adopting fair argument standard].)

The community and CEQA expert David Tanner have stated *numerous* potentially significant environmental impacts, all of which should be addressed by requiring SCE to obtain a PTC or have an EIR prepared, *prior* to allowing this massive project to proceed unchecked. It is very alarming that this Commission would not "error on the side of caution and the environment" in the face of all the environmental concerns that have been raised in regard to this project. We are confident that a court of law will.

The Draft Resolution erroneously decides issues that cannot be decided absent a PTC or an EIR. The Staff conclude, in the face of a valid controversy and fair argument, that this massive project will have *no* potential significant environmental impact when it has no *evidence* before it to support that conclusion. The evidence needed to reach that conclusion would come from the PTC or EIR.

SCE is standing on the head of a semi-colon, claiming this massive project is exempt from environmental review because it will be constructed within an existing right of way ("ROW"). To allow a new project of this magnitude to completely avoid the permitting process and environmental review, simply because the project will be built upon an existing easement or ROW flies in the face of the overall intent of GO 131-D, CEQA guidelines, and common sense. The Commission should take this opportunity to amend or re-write GO 131, Section III, Subsection B.1.g. ("Exemption g.") because it is fundamentally flawed and it has been interpreted too broadly.

The Staff's interpretation of Exemption g. is inconsistent with the cannons of statutory construction accepted by all the courts in the State of California. It is fundamental that in construing a statute, the purpose is to ascertain the intent of the law-making body so as to effectuate the *purpose* of the law. (*People v. Dyer* (2002) 95 Cal.App.4th 448, 452-453, citing *People v. Jefferson* (1999) 21 Cal.4th 86, 94.) A construction should comport most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and interpretations that would lead to absurd consequences should be avoided. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246; *People v. King* (1993) 5 Cal.4th 59, 69.)

It leads to absurd consequences to allow a project of this magnitude to completely avoid any environmental scrutiny simply because the utility company may have purchased a right to use the land. Title to the land has *nothing* to do with the potential environmental impacts which flow from the *use* of the land. CEQA is not concerned with title to property. Under the criteria utilized by the Staff, no project within an existing ROW would ever have to be studied, because there would be no need to investigate whether circumstances have changed or whether there are better alternatives. This is obviously absurd.

Public policy clearly favors environmental review and public participation in an open forum. "We have repeatedly recognized that the EIR is the 'heart of CEQA.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights, supra*, 47 Cal.3d at p. 392; see also Guidelines, § 15003, subd. (a).) Contrary to this overarching goal, the Staff gives SCE a free-pass to construct any project, of any size, without any environmental review or oversight whatsoever. Clearly, the Resolution fails to carry out the intent of the Legislature which requires the CPUC to regulate SCE's activities in a manner that gives "major consideration" to preventing environmental damage. (Pub. Res. Code, § 21000, subd. (g).)

It is time to amend Exemption g. so that it carries out the intent of GO 131-D, the requirements CEQA, and the public policy of the State of California. The Commission needs to intervene to protect the environment and to best serve the public. This is, as we understand it, the very purpose of this Commission.

No alternatives have been studied or publicly discussed. There are viable alternatives available here, at least insofar as Section II of the project is concerned. The new poles that SCE proposes to construct in Section II will be placed to the east of existing poles, closer to residential homes and neighborhoods, and literally in the backyards of many residents. The new poles could be moved to the alternate ROW, 1,800 feet to the west (a viable location according to SCE's own project designer). The new poles could be placed to the west side of the towers in the subject ROW (further away from the greatest number of homes). The new poles could also be placed underground for the mere five-mile stretch that effects the residents of the Santa Rosa Valley. Although this process has gone on for nearly nine months now, the Staff has not once asked or required SCE to even consider alternative facilities, revising routes, or to evaluate acquiring new, less impactful ROW's in concert with other agencies.

Conclusion

The community has filed numerous documents evidencing the many significant impacts that will result from the proposed project. We have set forth legal positions contradicting Staff's reliance on exemptions to CEQA, and their conclusions that none of the exceptions to the exemption apply here. The Resolution erroneously decides environmental issues it cannot decide without a PTC or an EIR. It also misstates and omits facts presented which, if fairly presented, would lead this Commission to require SCE to obtain a PTC. The community at large, along with the City, County, and Municipality opposing this project have presented a *fair argument* that this massive project *may have* a potentially significant impact on the environment. That is all that is required at this stage of the proceedings. Therefore, this Commission must reject the Draft Resolution and order SCE to obtain a PTC.

If I can answer any questions or provide any further information helpful to the Commission's decision, please do not hesitate to contact me.

Very truly yours,

Danalynn Pritz, for
PRITZ & ASSOCIATES

DLP:ln