BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of San Diego Gas & Electric Company (U 902-E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project	Application No. 05-12-014 (Filed December 14, 2005)

BRIEF OF THE SAN DIEGO CHAPTER OF THE SIERRA CLUB AND THE CENTER FOR BIOLOGICAL DIVERSITY IN RESPONSE TO THE COMMISSION'S QUESTIONS FOR ALL PARTIES

Justin Augustine
Center for Biological Diversity

Center for Biological Diversity
San Francisco Bay Area Office
1095 Market St., Suite 511
San Francisco, CA 94103
Telephone: 415-436-9682 ext. 302
Facsimile: 415-436-9683
E-Mail: jaugustine@biologicaldiversity.org
Attorney for the Center for Biological Diversity

Paul Blackburn
San Diego Chapter, Sierra Club

Sierra Club
San Diego Chapter
3820 Ray Street
San Diego, CA 92104
619-299-1741
619-299-1742
SDEnergy@sierraclubsandiego.org

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QUESTIONS FOR ALL PARTIES

1. What is the legal standard for waiving the Commission's rules and General Orders requested by SDG&E?

Waivers or deviations from the Commission's procedural rules and General Orders must not violate law, including both statutory and regulatory law. *See* Cal. Pub. Util. Code § 1756, 1757; *Southern Cal. Edison Co. v. Public Utilities Com.*, (2000) 85 Cal. App. 4th 1086, 1096 ("Section 1756, as amended effective January 1, 1998, allows litigants challenging decisions of the PUC to petition this court directly for a writ of review. Section 1757 delimits the scope of our review of PUC decisions. As pertinent here, section 1757 requires us to determine whether the PUC abused its discretion or failed to proceed in the manner required by law."). However, the Commission may waive the requirements of rules and general orders to the extent permitted by the rules or general orders themselves and may implement these regulations with a degree of flexibility limited by the fundamental requirement that it may not violate law as it is ultimately interpreted by the judiciary. *See Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 8 (Cal. 1998) ("The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."). The following applies this legal standard to the Commission's Rules of Procedure and Practice ("Rules") and General Order 131-D ("GO 131-D").

I. The Standard for Deviations from Procedural Rules

The standard for Deviations from the Commission's Rules is defined by the "special case" and "good faith" requirements contained in Rule 87 itself, but limited by the scope of

application of this rule as well as the fundamental requirement that the Commission may not violate the law.

Rule 87 by its plain language applies only to the Rules and not to other regulatory or statutory requirements. GO 131-D is not a procedural rule and therefore is not subject to deviation pursuant to Rule 87. *See People v. Guzman*, (2005) 35 Cal. 4th 577, 587 ("insert[ing] additional language into a statute violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not 'insert what has been omitted' from a statute."). The Commission cannot empower itself to waive statutory requirements embodied in regulations, and it would be inappropriate to interpret Rule 87 as providing authority to waive a broad range of regulatory requirements. *See* 1997 Cal. PUC LEXIS 1032 ("No one should believe, however, that Rule 87 is a way to get around the spirit and intent of [the law].").

Further, as evidenced by past use of Rule 87, it is only intended to deal with situations where failure to comply with Commission Rules is harmless, and therefore unnecessary. *See* 2002 Cal. PUC LEXIS 607 ("In order to allow the Commission to take action on a timely basis, it is reasonable to shorten the waiting period by one day, pursuant to § 311(d) and Rule 87."); 2001 Cal. PUC LEXIS 921 ("While we could dismiss the petition for this technical noncompliance with Rule 47, we decline to do so. Rule 87, in pertinent part, expressly permits liberal construction to secure just, speedy and inexpensive determination of the issues presented. From time to time, when we have determined that the public interest warranted it, we have entertained other petitions for modification which, though they lacked specific, proposed wording, were sufficiently clear to permit us to consider them on the merits."); 2000 Cal. PUC

LEXIS 833 (“Since the supplements or initial applications for rehearing are limited in their scope, pursuant to Rule 87 a deviation will be granted from the time specified in Rule 86.2 to give parties until November 10, 2000 to file responses to any filed supplements or initial applications for rehearing complying with this ruling.”); 1998 Cal. PUC LEXIS 756 (“Even assuming arguendo that we did not follow our Rules, no harm was done since the undergrounding issue was not essential to the approval of PG&E's application for a permit to construct the substation. That approval was based on independent grounds which included an extensive environmental review and public participation process.”) This history demonstrates that the Commission may use Rule 87 authority only with regard to deviations from the Rules themselves in a manner that does not violate substantive requirements.

The Center for Biological Diversity and the San Diego Chapter of the Sierra Club’s (“Conservation Groups”) Response to SDG&E’s Motion to Defer discusses the “special case” and “good cause” standards. The fundamental requirement that agency interpretation and implementation of regulations, such as Rule 87, not violate the law is discussed below.

II. Deviations from General Order 131-D

Conservation Groups are not aware of any provision in the General Orders that allows the Commission to waive the requirements of GO 131-D. Since many provisions in the Commission’s General Orders implement statutory requirements, it would not be appropriate for such general waiver provisions because an agency cannot grant itself authority to violate the law. Therefore, the Commission may not “waive” GO 131-D requirements. In addition, once an agency creates rules, as the Commission has done with GO 131-D, it must then follow them. *See Amluxen v. Regents of University of California,* (1975) 53 Cal. App. 3d 27, 36 (“if the government agency has established discharge regulations the agency must comply with those

regulations as a matter of constitutional due process ….”); *see also Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (U.S. 1982) (“the understanding of the parties was reinforced by the well-established legal principle that a federal agency must comply with its own regulations.”); *Andriasian v. INS*, 180 F.3d 1033, 1046 (9th Cir. 1999) (“it is a well-known maxim that agencies must comply with their own regulations.”).

In the absence of a specific provision that permits the Commission to waive the requirements of GO 131-D, the Commission’s ability to adapt statutes and regulations, including the General Orders and the Rules of Procedure, to specific circumstances is limited to its legally permissible flexibility in interpretation. This flexibility is ultimately defined by the courts, which are the ultimate interpreters of law. *Southern Cal. Edison Co.*, 85 Cal. App. 4th at 1096 (“The interpretation of a regulation, like the interpretation of a statute, is a question of law subject to our independent review.”). Therefore, the Commission may act with a degree of flexibility in interpreting and implementing law and regulation that is in accordance with what would likely be allowed by the courts.

In matters of agency interpretation of statutes and regulations performed in the course of applying these regulations (as opposed to challenges to the promulgation of regulations), the California courts have stated that the standard of review applied by courts is a situational respect for the opinion of the agency with the ultimate authority to interpret law reserved to the courts. *Yamaha*, 19 Cal. 4th 1; *Southern Cal. Edison Co.*, 85 Cal. App. 4th at 1096 (“An administrative agency's interpretation of its own regulations is entitled to consideration and respect by the courts. However, the level of deference due to an agency's regulatory interpretation turns on a legally informed, commonsense assessment of its merit in the context presented. Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent--the ‘weight’ it

should be given--is thus fundamentally situational. A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command."). The degree of weight given to an agency's opinion of the meaning of a law or regulation by the courts turns on a number of factors including plain language, authorship by the agency, conflicting interpretations by agency, technicality of the subject matter and longstanding consistency of interpretation. *See Yamaha*, 19 Cal. 4th 1; *Southern Cal. Edison Co.*, 85 Cal. App. 4th 1086.

2. Has SDG&E met that legal standard?

I. <u>The Proposed Deviations Are Illegal under the California Public Utility Code, CEQA and GO131-D</u>

As already described in Conservation Groups' Response and CEQA Motion and further discussed herein, the proposed deviations violate the California Public Utilities Code, CEQA, GO 131-D and the Rules. Therefore, SDG&E cannot meet any legal standard to provide a "waiver."

II. <u>The Proposed Deviations Exceed the Interpretive and Implementing Flexibility Granted the Commission by the Courts</u>

SDG&E's proposed deviations fail to meet the legal standard established by the California Supreme Court in *Yamaha Corp. of America v. State Bd. of Equalization* that limits agency interpretive, and therefore implementing, flexibility. 19 Cal. 4th at 8. In a determination of whether the proposed deviations would violate law, the courts will determine whether the Commission's interpretation of the Rules, GO131-D and the Public Utility Code to permit the deviations is correct. As this interpretation is a matter of law and not fact, the courts retain the

ultimate authority to make this determination, but will do so with appropriate deference to the Commission's interpretation. As previously discussed in Conservation Groups' Response to the Motion to Defer, the proposed deviations would require an interpretation of the Rules, GO 131-D and the Public Utility Code that would not be permitted by the courts. In evaluating such interpretation, the courts would not defer to the Commission's interpretation and would give it only limited weight, for the following reasons:

A. The Commission Does Not Possess Any Special Expertise in Regard to Procedural Issues or CEQA Compliance

In *Yamaha*, the Supreme Court made clear that an agency interpretation of its own regulations would receive greater deference if "the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." 19 Cal. 4th at 12. In this instance, however, the language of the agency procedural rules and General Order at issue "do not require administrative expertise," are clear on their face, and concern procedural matters well within the expertise of courts to interpret, not complex technical analysis. *See Southern Cal. Edison Co,* 85 Cal. App. 4th at 1105-06. Therefore, a court would not defer to the Commission's reasoning for deviating from such rules and would instead "apply the regulation as [the court] understand[s] it." *Id*. Moreover, because the Commission does not possess any special knowledge of the CEQA process, it possesses no "comparative interpretive advantage over the courts," and will receive no deference from the courts in regard to any CEQA determinations it makes. *See Yamaha,* 19 Cal. 4th at 12.

B. The Plain Language of GO 131-D Does Not Allow for Deference

General Order 131-D and the Commission Rules are clear on their face what is and what is not required with an application. In addition, the application requirements are preceded by

'shall' language (e.g. Section IX(A)(1)(a-h) of GO 131-D specifies that applications for a CPCN for transmission lines "shall also include" eight categories of information.). In *Southern Cal. Edison Co.*, the court explicitly pointed out that "an agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision." 85 Cal. App. 4th at 1105. Here, the plain language dictates that despite SDG&E's desire to, it may not defer the requirements of GO 131-D or the Commission Rules when it submits an application.

C. The Commission Has Not "Consistently Maintained the Interpretation in Question;" Rather Long-Standing Agency Practice Argues Against the Deviations

Courts have reason to show deference when evidence exists that the agency "has consistently maintained the interpretation in question, especially if [it] is long-standing." *Yamaha*, 19 Cal. 4th at 13. For instance, the Commission has, on numerous occasions, consistently used Rule 87 to grant waivers from the provisions of Rule 21 in order to obviate burdensome service requirements.[1] *See e.g.* 2002 Cal. PUC LEXIS 527. However, the Rule 21 example demonstrates that Rule 87 is only used to avoid unnecessary duties. In this instance, SDG&E seeks to avert many application requirements that speak to important considerations such as environmental impacts and public notice requirements (esp. for those people directly impacted by the transmission line). In essence, SDF&E wishes to rewrite the rules, not make an inconsequential deviation from an established rule.

[1] "[Rule 21] requires service of a notice of the application on all city and county officials within whose boundaries the passengers will be loaded or unloaded. Applicant served a notice to the eight involved counties, 20 cities, the affected airport, and public transit operators in the service area. Applicant states that all parties that have an interest in Commission proceedings subscribe to or have access to the Commission's Daily Calendar. We shall exercise the discretion accorded to us by Rule 87 and grant the waiver requested by Applicant because it will be providing on-call service, not scheduled service, and service on all cities in the service territory would be burdensome."

Not only has the Commission never allowed such serious waivers of its rules, it has consistently done just the opposite by requiring utilities to include all the application requirements contained in its Rules and GO 131-D. The CPCN requirements for +200 kV transmission lines were first promulgated in GO 131 in 1970 demonstrating that for 35 years now, the Commission has consistently required compliance with such requirements. *See* 1970 Cal. PUC LEXIS 660. Moreover, Decision No. 77301, which issued GO 131, states that "[t]he rules contained in the general order attached to this decision are reasonable and are the ones deemed essential at this time. If a need for changes appears as experience is gained in their operation, procedures exist for amending the general order." Thus, longstanding practice requires that all application materials be submitted in accordance with the Rules and GO 131-D so that all considerations, including environmental impacts and project alternatives, can be assessed together.

Also, the Commission's uncertainty of its ability to grant the requested deviations as shown by the questions contained in the Assigned Commissioner Ruling indicates that the Commission itself is uncertain about its authority to interpret the law in a manner required to grant the requested deviations and would be viewed by the courts as evidence of inconsistent interpretation.

D. The Commission's Authorship of the Rules and GO131-D Is Not a Significant Factor

A Commission's authorship of rules does not give it *carte blanch* to reinterpret rules as it applies them. Rather, an agency must comply with its own rules. Here, nothing about Rule 87 is so specialized as to render Commission authorship a meaningful factor. With regard to GO 131-D, the substantive requirements were authored in 1970 and the notice requirements in 1994, such that the current Commissioners and staff do not necessarily have any greater insight into the

intent of the Rules than would be available to a judge. Therefore, the Commission's authorship will not result in deference to the Commission's interpretation.

E. The Totality of the Circumstances Shows that the Commission Will Receive Little Deference from the Courts in regard to SDG&E's Proposed Rule Deviations

The *Yamaha* Court cited a well known U.S. Supreme Court decision, *Skidmore v. Swift*, in its discussion of administrative deference:

> The deference due an agency interpretation…turns on a legally informed, commonsense assessment of their contextual merit. The weight of such a judgment in a particular case, to borrow again from Justice Jackson's opinion in *Skidmore*, will depend upon *the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control*." (citations omitted)

19 Cal. 4th 1, 13-14.

Nothing about SDG&E's effort to defer its duties under the California Public Utility Code, CEQA, GO 131-D, and the Rules is persuasive. Technical expertise is not at issue, the requirements are plain on their face, and this is the first time such extreme deviations from CPUC requirements have been proposed and with considerable consequences. Therefore, under such circumstances, Commission support for SDG&E's attempt to bifurcate the CPCN process would have no "power to persuade."

III. <u>The Scope of Rule 87 Does Not Permit the Commission to Deviate from Its Procedural Rules to the Extent that Doing So Would "Waive" the Requirements of GO 131-D or the Public Utility Code.</u>

Prior applications of Rule 87 by the Commission show that it has been used only to address situations where failure to comply with procedures is harmless, involves minor changes in procedure, increases administrative efficiency, and is needed to avoid injustice. Here, SDG&E cannot show that the Commission's standard application review procedure creates an

injustice because doing so would require proving that this long-standing procedure is unjust, inefficient and unimportant.

In this situation, SDG&E's proposed use of Rule 87 would ignore much of both the Rules and GO 131-D, as well as the Commission's prior interpretations of the scope of Rule 87 as evidenced by the nature of its prior application. As described here and in Conservation Groups' CEQA Motion and Response, the proposed deviations would have severe implications in regard to due process, utility law review and environmental review. The Commission itself has stated that Rule 87 should not be used to "to get around the spirit and intent" of the law. 1997 Cal. PUC LEXIS 1032. But that is exactly what would happen if CPUC allows Rule 87 to be invoked so that SDG&E can sidestep Commission rules, GO 131-D and the Public Utility Code.

Granting SDG&E's Motion to Defer would allow Rule 87 to usurp the Rules themselves and doing so would not only undermine the Rules but would have significant consequences in regard to CEQA review and public involvement. In other words, SDG&E's proposed use of Rule 87 is extremely disproportionate to its intended use. No reason has been provided by SDG&E to justify the severe injustice that would be caused by delaying environmental review, delaying thorough consideration of project alternatives, and delaying adequate public notice. Therefore, because SDG&E's proposal to invoke Rule 87 is anything but harmless, it should not be allowed.

Because the deviations SDG&E has requested are so significant, the reasons for granting such deviations must be extremely compelling and necessary to avoid injustice. That is not the case with SDG&E's Application. No compelling reasons have been forthcoming from SDG&E and there is nothing unusual about SDG&E's proposed Powerlink. Rather, granting SDG&E's requested deviations from long established review procedures would violate the rule of law and

create an injustice. Therefore, application of Rule 87 is inappropriate in this situation and can not be invoked.

3. Has SDG&E complied with the requirements of § 1003 of the Pub. Util. Code?

Section 1003 of the Public Utility Code states that SDG&E's Application

> "*shall* include…(a) Preliminary engineering and design information on the project…(b) A project implementation plan showing how the project would be contracted for and constructed… (c) An appropriate cost estimate… (d) A cost analysis comparing the project with any feasible alternative sources of power… (e) A design and construction management and cost control plan …."

Cal Pub Util Code § 1003 (emphasis added).

SDG&E's Application failed to meet any of those requirements. Because SDG&E wishes to wait until a route has been selected, it has chosen to ignore § 1003's provision (a) and (b). Although SDG&E has provided some information regarding cost, that information is not "appropriate" and therefore fails to meet provision (c)'s standards because it is extremely broad and offers little guidance as to what real costs will be. As described in Conservation Groups' CEQA Motion and Response, SDG&E has failed to meet provision (d)'s standards because the alternative comparison that SDG&E did perform leaves out many alternatives and much of the information provided is either inaccurate or deficient. Finally, in regard to provision (e), SDG&E has not submitted a design and construction management and cost control plan. In short, there is no question that SDG&E has failed its duties pursuant to § 1003.

It must be recognized that SDG&E is in violation of § 1003 for the following reasons as well.

I. Section 1003 Must Not Be Interpreted in Isolation from Other Provisions of Utility Law and Regulation

Section 1003 must not be read in isolation from related provisions of the Public Utility Code, including but not limited to §§1002, 1002.3 and 1005, which together require integrated

analysis and decision making on applications that integrate a variety of technical, economic, community and environmental factors. Any change in interpretation of § 1003 would of necessity implicate the implementation of these other provisions such that it is not possible to analyze whether SDG&E has complied with § 1003 without also analyzing the impact of the SDG&E's actions on the implementation of these other provisions.

Also, the Commission's promulgation of GO 131-D is itself the Commission's formal interpretation of the requirements of the entire Public Utility Code as it applies to this situation such that § 1003 and GO 131-D are inseparable in interpretation. As § 1003 states, "Every electrical and every gas corporation submitting an application to the commission for a certificate authorizing the new construction of any electric plant, line, or extension,…shall include all of the following information in the application *in addition to any other required information*…" Cal. Pub. Util. Code § 1003 (emphasis added). GO 131-D is the Commission's regulation that defines "any other required information . . . ." Therefore, SDG&E's failure to met the requirements of GO 131-D is likewise a failure to meet the requirements of § 1003.

II. The "Shall" Language of § 1003 and GO 131-D Mandates Compliance

The California courts have explicitly determined that use of the term "shall" is the strongest directive in statutory and regulatory language such that agencies have no discretion to ignore such language absent extraordinary circumstances such as that demonstrated by separate legislation. *See Larson v. State Prs. Bd.*, (1994) 28 Cal. App. 4th 265, 276 ("The ordinary meaning of "shall" or "must" is of mandatory effect…."); *see also Austin v. Department of Motor Vehicles*, (1988) 203 Cal. App. 3d 305, 309 ("As was so precisely put by the trial judge, 'shall' means 'shall.' The word 'shall' is ordinarily 'used in laws, regulations, or directives to express what is mandatory.'" (citations omitted)). SDG&E, however, has failed to demonstrate

any reason, let alone an extraordinary one, as to why any of § 1003 and GO 131-D's "shall" language should be ignored or deferred. Therefore, there is no question that SDG&E has violated both § 1003 and GO 131-D.

III. Neither GO 131-D nor Section 1003 Allows Information to Be Provided on a Staggered Basis or for One Element to Be Given Greater Consideration

Neither § 1003 nor GO 131-D state that the information required can be provided on a "staggered" basis. Therefore, all parts of GO 131-D and § 1003 must be complied with at the same time to give effect to the entire statute and regulation. *See Sara M. v. Superior Court*, (2005) 36 Cal. 4th 998, 1021 ("The objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent."); *see also Gomez v. Superior Court*, (2005) 35 Cal. 4th 1125, 1146 ("we look to 'the entire substance of the statute ... in order to determine the scope and purpose of the provision ....").

The logical intent of § 1003 and GO 131-D is for the applicant, here SDG&E, to provide all information at the same time so that it can be considered as a whole and each item can be provided a co-equal place in any decision making. To do otherwise undermines both § 1003 and GO 131-D and would preclude proper consideration of, among other things, environmental impacts of the Powerlink.

IV. Long-standing Commission Practice Has Been to Consider All Information Concurrently

To Conservation Groups' knowledge, the Commission has no history of bifurcating "need" from "route" in its application review proceedings, other than in response to the Transmission Investigation and AB970, which Conservation Groups have previously distinguished. Neither SDG&E nor any other party has identified any prior proceeding in which

the requested or similar deviations were granted by the Commission. Therefore, Conservation Groups assert that it is an uncontested fact that the Commission has considered "need" and "route" in a unified fashion since at least the promulgation of GO 131-D in 1970. As discussed previously, such a history will lead a court to show little deference if the Commission chooses to allow SDG&E's deviations from § 1003 and GO 131-D. Therefore, SDG&E's Application does not meet the requirements of § 1003 as evidenced by long-standing Commission practice.

V. The Commission May Not Interpret Section 1003 on an Ad Hoc Basis to Require Less than that Required by GO 131-D

An ad hoc change in interpretation of § 1003 in the fashion that SDG&E has proposed would fly in the face of the longstanding commitment to those requirements and would create confusion in future applications of GO 131-D requirements. A second guessing by the Commission regarding how far it can push its regulatory flexibility in complying with §1003 might be useful in the context of a rulemaking to amend GO131-D, but is not relevant to interpreting the plain meaning of both of these sources of law in their actual application. *See Cullinan v. McColgan*, (1947) 80 Cal. App. 2d 976, 979 ("In *United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 277-278, the court said: 'It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation….'"). Moreover, the Commission can't override or ignore the requirements of GO 131-D simply because § 1003 could be interpreted to require less. As explained in *Amluxen v. Regents of University of California*, once an agency creates regulations, even if they are more than what is required by law, those regulations must be adhered to. 53 Cal. App. 3d at 36. Because § 1003 and GO 131-D are explicit about what is required and because GO 131-D is an extension of § 1003, only complying with § 1003's minimum requirements would still be a violation of § 1003. Should the Commission desire to

reinterpret § 1003, it should do so in the context of a rulemaking to amend GO131-D, as anticipated by the Commission itself in 1970.

4. Please discuss legal and policy issues regarding delay in providing the legal notice required by the Commission's rules. Given the Commission's preference to ensure full public notice, what factors argue in favor of deferring compliance with the requirement?

I. The Legal Standard for Notice Under California Law

The Commission is required to provide notice of it proposed actions under the due process clauses of the U.S. and California Constitutions. *Edward W. v. Lamkins* (1st Dist. 2002) 122 Cal. Rptr.2nd 1, 11. Whereas agency "legislative" actions do not require notice, notice is required for quasi-judicial actions in which the agency has the discretion to determine facts and law and apply them to a particular person. *Horn v. City of Ventura* (1979) 24 Cal.3d 605, 612-13. Due process is required where an agency action may directly and adversely affect protected property interests. See *Id*. In *People v. Ramirez* (1979) 25 Cal.3d 260, 268, 158 Cal. Rptr. 316, 599 P.2d 622, the Supreme Court established the due process standard to ensure "freedom from arbitrary adjudicative procedures . . . ." It stated that compliance with due process is situational in nature and required agencies to consider the following when determining the nature of the notice and hearing required in a particular situation:

> (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional safeguards, (3) the dignity interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible government official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

These decisions make clear that notice must focus on the potential adverse impacts on the "private interest" as well as an individual's right to participate in the particular government

process that might result in such adverse impact. Notice that fails to alert a person to the threats to their rights is not adequate. Mere description of a project without a description of its potential threat to fundamental rights does not constitute notice.

II. Requirements for Notice Contained in GO 131-D

Where a person applies for a CPCN to construct a transmission line of 200 kV or higher the Commission has defined the methods of distribution and contents of such notice. GO 131-D Section XI ("Section XI"); Decision 94-06-014.[2] Section XI embodies the Commission's judgment on the notice required for it to comply with constitutional due process requirements. In relevant part, Section XI(A) requires the following methods of providing notice:

> Notice of the filing of each application for a CPCN . . . *shall be given* by the electric public utility *within ten days* of filing the application:
> 1. By direct mail to:
> a. [local, state and federal agencies]; and
> b. All owners of land on which the proposed facility would be located and owners of property within 300 feet of the right-of-way as determined by the most recent local assessor's parcel roll available to the utility at the time notice is sent; and
> 2. By advertisement not less than once a week, two weeks successively, in a newspaper or newspapers of general circulation in the county or counties in which the proposed facilities will be located, the first publication to be not later than ten days after filing of the application; and
> 3. By posting a notice on-site and off-site where the project would be located.

(Emphasis added.) When it promulgated this regulation, the Commission considered the full range of methods to provide notice, from personal service to publication, considered the property interests at stake, and constructed a balanced approach that relies on three different methods of notification. Further, the Commission required that this notice be provided within ten days. The use of the word "shall" indicates that these requirements are mandatory and the methods chosen assume that applications would contain the route information required by GO131-D Section IX.

[2] In decision to implement Section XI, the Commission discussed the Horn decision, supra.

Further, Decision 94-06-014 makes clear that the Commission was fully aware of the administrative burden of these methods.

Section XI(C) imposes the following consultation and content requirements. These requirements ensure that the contents of notices sent on the Commission's behalf by the applicant utility, which is not a disinterested party, is fair and adequate:

> Each utility *shall consult* with the CACD and CPUC Public Advisor to develop and approve a standard for the notice required by subsections A and B, which *shall contain*, at a minimum, the following information:
> 1. The Application Number assigned by the CPUC or the Advice Letter Number assigned by the utility; and
> 2. A concise description of the proposed construction and facilities, its purpose and its location in terms clearly understandable to the average reader; and
> 3. 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; and
> 4. Instructions on obtaining or reviewing a copy of the application, including the Proponent's Environmental Assessment or available equivalent, from the utility; and
> 5. The applicable procedure for protesting the application or advice letter, as defined in Sections XII and XIII, including the grounds for protest, when the protest period expires, delivery addresses for the CPUC Docket Office, CACD, and the applicant and how to contact the CPUC Public Advisor for Assistance in filing a protest

(Emphasis added.) These provisions are designed to comply with constitutional notice requirements in that they inform interested parties not merely of the possibility of a new transmission line but of the possible adverse impacts of such line on their interests in a way that is understandable, as well as to inform parties of the nature of the process and their right to participate. The use of the word "shall" indicates that these requirements are mandatory and the methods chosen assume that applications would contain the route information required by GO131-D Section IX. The Commission may not violate Section XI.

III. A Failure to Provide Notice as Required by GO 131-D Violates California Law and the Due Process Requirements of the California Constitution

Section XI imposes mandatory requirements for notice with regard to contents, timing and method of distribution. The Commission may not delay this notice without violating law.

Here, there is no factual dispute that the Commission has failed to provide the required notice. It has not provided notice to parties within 300 feet of the proposed route; it has not posted on-site and off-site notices; it has not consulted with SDG&E on the content of the notice (to Conservation Groups' knowledge, neither SDG&E or the Commission have alleged that SDG&E consulted with the Commission on the contents of its public relations campaign literature); it has not published notice with required content. Although SDG&E is required to effectuate this requirement on the Commission's behalf, such delegation does not release the Commission from its due process obligations.

Instead, SDG&E claims that a public relations campaign initiated by it serves as adequate notice. SDG&E refers to a range of published documents and meetings that substitute for the required legal notice pending announcement of a route. This process is inadequate for the following reasons:

A. Delay Would Result in an Unfair Process.

The failure to provide the required notice means that interested parties to this process have not received comparable notice to that provided in all prior applications since the promulgation of the GO131-D notice requirements in 1994. Whereas prior interested parties were given notice of a unified proceeding such that they could fully participate in the Commission's "need" analysis, SDG&E assumes that similarly situated parties in this proceeding have a lesser right to participate in this "need" analysis. Yet, the Commission's need analysis may result in a decision that results in adverse impacts on a variety of interests, including the

taking of property. The vague nature of SDG&E's possible routes do not lessen the risk to as yet unknown particular individuals who will ultimately be shown to be within 300 feet of SDG&E's proposed route. These individuals have just as much right to know about and participate in the Commission's "need" analysis as all similarly situated individuals. Rather, these unknown individuals have even more interest in participating in this need analysis given its uncertainty and potential for impacting their interests earlier than would happen in normal proceedings.

B. Delay is Not Justified by Provision of Public Relations Materials Provided by Interested Regulated Entity.

SDG&E has not alleged that the materials provided by its public relations campaign inform individuals of the possible adverse impacts on their interests and their legal rights to participate in this proceeding. Instead, it appears that SDG&E's public relations campaign focuses on the merits of the proposed transmission line; it speaks from SDG&E's point of view and not from the point of view of interested parties. GO 131-D imposes specific consultation and content requirements to prevent exactly this sort of self-interested communication by utilities. By way of analogy, there is a striking difference between on the one hand being told that a developer may build a new mall in one's town (which may sound appealing to many residents), and on the other hand being told that a developer intends to build a mall on or immediately adjacent to one's home. The volume of material provided by SDG&E is irrelevant if the contents of this material fail to speak to the possible adverse impacts of the proposed transmission line on identified individuals.

C. A Post Hoc Approval of SDG&E's Proposed Notice Process Would Itself be a Violation of the Constitution's Due Process Requirements

Section XI requires that the Commission inform the public of its due process rights in this proceeding. An unprecedented, unannounced ad hoc change in these proceedings would result in

an unfair process, particularly where there is no compelling reason for such change. Although the Commission may delegate the implementation of Section XI to SDG&E, it appears in this situation that a post hoc approval of a radical change in notice requirements without prior consultation with the utility or any apparent control over this purported substitute notice process is nothing more than a complete abdication of this fundamental responsibility to a regulated entity. The question of whether a public relations campaign independently designed and implemented by a regulated entity could serve to fulfill the constitutional due process obligations of a state agency would present an unusually novel situation in the annals of due process adjudication.

D. The Public Confusion and Frustration in Evidence in this Proceeding Indicate that SDG&E's Proposed Substitute Notice Process is Unfair and Risks Increased Contention and Delay

As described in filings by RAASP, many citizens have expressed confusion and frustration with the Commission's process. SDG&E's failure to comply with the Commission's express notice requirements has contributed to this confusion and frustration. Constitutional due process requirements are intended to avoid exactly this type of interaction between citizens and their government. Further non-compliance with due process requirements will only serve to exacerbate this situation.

IV. No Factors Argue in Favor of Deferring Notice Requirements

It is impossible for a delay in notice to increase public participation in this process; such delay can only reduce public participation. SDG&E has presented a number of administrative arguments about why a delay would serve its interests and allegedly the public interest. However, SDG&E has failed to identify any factors that justify these alleged administrative

benefits at the cost of providing less due process protection to the citizens whose rights are at risk.

Respectfully submitted February 24, 2006,

The San Diego Chapter of the Sierra Club
and the Center for Biological Diversity

By: /s/ Justin Augustine
Justin Augustine

Center for Biological Diversity
San Francisco Bay Area Office
1095 Market St., Suite 511
San Francisco, CA 94103
Telephone: 415-436-9682 ext. 302
Facsimile: 415-436-9683
E-Mail: jaugustine@biologicaldiversity.org
Attorney for the Center for Biological Diversity

By: /s/ Paul Blackburn
Paul Blackburn

Sierra Club
San Diego Chapter
3820 Ray Street
San Diego, CA 92104
619-299-1741
619-299-1742
SDEnergy@sierraclubsandiego.org

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the California Public Utilities Commission's Rules of Practice and Procedure, I have served a true copy of "BRIEF OF THE SAN DIEGO CHAPTER OF THE SIERRA CLUB AND THE CENTER FOR BIOLOGICAL DIVERSITY IN RESPONSE TO THE COMMISSION'S QUESTIONS FOR ALL PARTIES"
to the following parties:

All parties on the service list for A. 05-12-014

Service was completed by email where available or by placing true copies, enclosed in a sealed envelope with first-class postage prepaid, to be deposited in the United States mail, or by hand delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24th day of February, 2006, at San Francisco, California.

/s/ Justin Augustine
Justin Augustine