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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

VIA ELECTRONIC MAIL ONLY

To: Tariff Unit at edtariffunit@cpuc.ca.gov
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

**Re: COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) ON
DRAFT RESOLUTION E-4550**

Dear Ms. Borak:

Pursuant to your letter dated January 25, 2013, and the email notification of Energy Division Director Ed Randolph on February 11, 2013, which granted 30 additional days for parties to submit comments, San Diego Gas & Electric Company (SDG&E) respectfully submits these Comments on Draft Resolution E-4550 (Citation Program or Program). SDG&E appreciates this opportunity to comment on the Energy Division's proposal to initiate a Citation Program.

As you know, SDG&E has been working collaboratively with Energy and Legal Division to reduce the administrative burdens and costs to ratepayers of project permitting and construction *without* cutting corners on compliance with the California Environmental Quality Act (CEQA). SDG&E shares Energy Division's goal of 100% compliance with CEQA and each requirement mandated by the Commission for its construction projects. We will continue to work closely with you and your staff towards all of these objectives.

Unfortunately, SDG&E believes that the proposed Citation Program is a step in the wrong direction. The Citation Program likely will lead to the unintended consequences of extending the project approval process, imposing additional administrative burdens, and driving overall project costs higher. These are not SDG&E's objectives, and we do not believe these are Energy Division's objectives either.

I. SUMMARY OF SDG&E'S CONCERNS

Energy Division requests that this Commission approve Draft Resolution E-4550, which would authorize Energy Division to impose fines on public utilities, that staff believes have not complied with Permits to Construct (PTC) and Certificates of Public Convenience and Necessity (CPCN) issued by the Commission for electric and gas projects. SDG&E believes the Citation Program is unnecessary, inefficient and potentially costly to ratepayers, and is not supported by a record. SDG&E does not agree that the proposed Citation Program would have no cost and will enable “staff to quickly address and prevent situations that may threaten human beings or sensitive environmental resources.”¹ The Draft Resolution states: “The purpose of the Citation Program is to reduce the number of compliance violations that occur by imposing fines when utilities fail to comply.”² The Draft Resolution acknowledges that the Commission already has authority to impose penalties; however that authority is exercised through a fair, albeit slow, Order Instituting Investigation (OII) process. Citation authority might expedite penalties, but it will not reduce the number of compliance violations and instead will only increase administrative burdens and costs on Energy Division.

The primary focus of the Citation Program appears to be compliance with the Mitigation Monitoring, Reporting, and Compliance Program (MMRCP)³ for each project, which the Commission adopts for projects subject to CEQA. In SDG&E’s experience, the administrative burdens and MMRCP obligations imposed on public utility projects have been extensive, costly, and, in some cases, unwarranted.

As described in more detail below, SDG&E is particularly concerned that the Citation Program: is not necessary⁴; interferes with the enforcement authority of resource protection agencies with specific expertise and jurisdiction; will discourage self-reporting; will add costs to ratepayers; and will delay project approval and construction. Notably:

- SDG&E is not aware of any knowing and intentional violations of an MMRCP. MMRCPs on major projects can be hundreds of pages with hundreds of requirements.

¹ Draft Resolution E-4550 (Draft Res.) at 1-2.

² *Id.* at 4.

³ Energy Division alternatively uses the term “Mitigation Monitoring, Compliance, and Reporting Program”, or MMCRP. For ease of reference, these Comments use the term MMRCP to refer to both MMRCPs and MMCRPs.

⁴ The Draft Resolution points to the Sunrise Powerlink Project, SDG&E’s most recent CPCN, as partial justification for the Citation Program. SDG&E’s most recent PTC is the ECO Substation Project, which is currently under construction. SDG&E’s experience does not indicate any need for the Citation Program. Throughout these comments, SDG&E provides specific examples from these projects to illustrate its position that a Compliance Program is not necessary.

Mistakes, usually by contractors, happen, but rarely – and are quickly resolved through corrective action.⁵ There is no reason to believe that after-the-fact fines by CPUC will prevent these rare mistakes, particularly where SDG&E works with a resource agency with specific expertise and jurisdiction to resolve a non-compliance.

- SDG&E already devotes significant resources to compliance with the Commission-approved MMRCs. On the Sunrise Powerlink Project, as required by the MMRC, SDG&E paid for an average of 150 monitors per day to monitor SDG&E's compliance with the MMRC, costing ratepayers roughly \$100 million. The rare events of non-compliance are not the result of a lack of effort.
- The vast majority of the non-compliance events are the result of contractor activity. SDG&E hires construction firms that specialize in utility infrastructure construction to build most of the projects approved by PTC or CPCN and requires its contractors to comply with all local, state and federal environmental and safety requirements. Contractors are required to comply with the Commission's requirements (including the MMRC) and to indemnify SDG&E if they fail to do so. Although fines must be imposed on the responsible entity to have any deterrent effect, imposing fines for contractor non-compliance likely will result in the risk of such fines being incorporated into the contractor pricing.
- The current system of monitoring with non-compliance reporting, and a schedule for implementing corrective action, results in rapid identification of issues and corrective action satisfactory to Energy Division. If Energy Division staff is authorized to impose financial penalties as well, more time will be spent debating whether a violation has occurred after the fact, with potential slowing of corrective action. Alternatively, work may be delayed to obtain express Energy Division authorization of daily work (in addition to obtaining Notices to Proceed for each work component). Either would result in work delays and higher costs.
- The proposed Citation Program allows appeal of Energy Division citations to an Administrative Law Judge (ALJ), but warns that, if an appeal is taken, any available remedy may be imposed. This effort to deter appeals to a neutral party means that a utility that decides to appeal will have to present a full evidentiary case, thus consuming more Energy Division and utility resources.
- Other than allowing an appeal to an ALJ, the proposed Citation Program contains no due process. There is no notice requirement, no opportunity to cure, no cap or criteria for imposing penalties. Instead, penalties can be imposed unilaterally, even where reasonable individuals or experts disagree over whether noncompliance has occurred. The lack of such protections suggests that the best means to encourage compliance for utility infrastructure projects has not been carefully considered.

SDG&E notes that the Draft Resolution was proposed without benefit of a record or stakeholder input, save for the comments now being submitted by parties in response to

⁵ On the Sunrise Powerlink Project, SDG&E received only twelve Non-Compliance Reports and two Stop Work Orders over 615 days of construction. This is an extraordinary record. Although SDG&E did not agree with all of the allegations contained in the non-compliance notifications, SDG&E worked with staff to resolve the underlying issues quickly, rather than contesting the allegations through a formal process, which it may have done under a citation program.

the draft. SDG&E believes a public process to determine if there are any systemic problems with environmental compliance, and evaluate the benefits and costs of any new potential remedies, is necessary before such authority can or should be delegated to staff. Until such a process provides an evidentiary basis to determine that new citation authority is beneficial and permissible, SDG&E believes the Draft Resolution is not justified or defensible.

II. BACKGROUND

A. THE DRAFT RESOLUTION

The Draft Resolution notes that, pursuant to CEQA, the Commission’s PTCs/CPCNs adopt “mitigation measures” (MMs) and Applicant Proposed Measures (APMs) that are incorporated in an MMRCP for each project. The Draft Resolution provides a few examples of simple mitigation measures and non-compliance events. Energy Division explains that both SDG&E and the CPUC hire experts to monitor compliance with the MMs, and that non-compliance events are “identified and reported by monitors and then documented with identified corrective actions.”⁶

Energy Division concedes that it currently addresses non-compliance events through non-compliance letters/meetings, where problems are identified and corrected, and that serious events can be addressed with fines levied through an Order Instituting Investigation (OII) or a Stop Work Order to halt construction.⁷ Nonetheless, Energy Division asks for authority to impose fines without an OII because it can be done “quickly” and allegedly will create “a financial incentive for the utilities to remain in compliance.”⁸

Under the proposed Citation Program, Energy Division Staff not only write the MMRCP and monitor compliance with it, but also decide when a violation occurs and whether to impose fines. The utility may appeal a citation to obtain an evidentiary hearing before an Administrative Law Judge (ALJ). If the utility chooses to do so, the Draft Resolution provides: “any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Fine.”⁹ The Draft Resolution also repeatedly states: “Fines will be paid by shareholders.”¹⁰

B. ENERGY DIVISION’S RIGOROUS AND EXTENSIVE APPROACH TO CEQA AND MITIGATION COMPLIANCE

The Citation Program must be viewed in the context of Energy Division’s underlying PTC/CPCN approval process, which is subject to CEQA. SDG&E commends Energy

⁶ Draft Res. at 2-4.

⁷ *Id.* at 6.

⁸ *Id.* at 7.

⁹ *Id.* at 13.

¹⁰ *Id.* at 1, 6, 10.

Division on its dedication to CEQA compliance and resource protection. Energy Division goes to great lengths to ensure compliance with both the procedural and substantive requirements of CEQA, an objective that SDG&E fully supports. Energy Division's approach to CEQA compliance and resource protection is rigorous and extensive, often exceeding the requirements of CEQA. The breadth and redundancy of Energy Division's CEQA mitigation and compliance program demonstrates that there is no need for or value associated with the Citation Program.

Basic Requirements of CEQA. Generally speaking, CEQA requires public agencies to analyze, disclose, and avoid or mitigate (to the extent feasible) a project's potential significant impacts on the environment.¹¹ When mitigation measures have been incorporated into a project to reduce impacts on the environment, those measures must be fully enforceable, and the lead agency must adopt a program to ensure compliance with those measures during project implementation.¹²

Identification of Impacts and Mitigation by Utility and Energy Division. Impacts and resource protection requirements are first identified by the utility via the preparation of a comprehensive Proponents' Environmental Assessment (PEA), which can take several months or years to prepare. Energy Division relies on the expertise of a third party environmental consultant to review the PEA and prepare an appropriate document under CEQA. Energy Division's consultant identifies numerous and detailed mitigation measures (MMs). In some instances, SDG&E may consider some MMs to be infeasible, unnecessary, impractical, or vague and thus prone to conflicting interpretation. SDG&E works with Energy Division to identify and resolve MMs that may be difficult to implement.¹³ As part of the PTC/CPCN approval process, extensive mitigation requirements are incorporated into an MMRCP, which also incorporates permitting requirements of a multitude of other federal, state and local agencies.

Post-Approval Addition of Requirements. After a MMRCP and PTC or CPCN are approved by the Commission, these mitigation and compliance requirements are

¹¹ See Cal. Pub. Res. Code §§ 21002-21003.1.

¹² Cal. Pub. Res. Code § 21081.6; 14 Cal. Code Regs. 15097.

¹³ SDG&E's efforts to clarify mitigation requirements during the drafting stage are not always successful. For example, during the CPUC's review of the ECO Substation Project, SDG&E alerted Energy Division via formal written comments submitted during the environmental review process to approximately 45 mitigation measures that were infeasible, duplicative, redundant, unnecessary, costly, or otherwise impracticable. Multiple mitigation measures addressed resource issues that fell squarely within the jurisdiction of another agency. SDG&E identified specific revisions to these mitigation measures in redline format that would resolve SDG&E's concerns. Unfortunately, of SDG&E's 45 comments seeking revisions to mitigation measures, only 4 were incorporated. See http://www.cpuc.ca.gov/environment/info/dudek/ECOSUB/Final_EIR/Vol03_E_ApplicantsRTCs.pdf. More than half were rejected outright, and only some were accepted in part. *Id.*

expanded considerably by Energy Division’s consultants in an effort to reduce *any* impact of a utility project on the environment and to promote compliance.¹⁴ The MMRCP often places the CPUC in the role of “responsible agency” for nearly all mitigation measures, even where other agencies have jurisdiction and special expertise.¹⁵

In addition to these additional requirements and interpretations, the MMRCP and MMs require preparation of a host of additional plans (*e.g.*, erosion control plans, fire prevention plans, nesting plans, cultural resource protection plans, mitigation plans, etc.), which in turn impose their own compliance requirements.¹⁶ Even after a “final” MMRCP is adopted by Energy Division, additional requirements and interpretations are sometimes inserted into a Notice to Proceed (NTP).¹⁷

Post-Construction Monitoring and Reporting. Once a project is in construction, Energy Division requires continual monitoring of construction on a wide variety of issues. Ratepayers pay for two sets of monitors: both the utilities’ monitors and also Energy Division contract monitors. Mitigation and permit compliance is reviewed and overseen daily by a large team of Commission and utility staff (Energy Division, CPUC environmental consultants, CPUC monitors, utility Environmental Services personnel, and third-party consultants and monitors), all of whom exercise their professional judgment on a daily basis to ensure compliance. In the event of a non-compliance, any one of the utility, agency or third party monitors may require corrective action and/or require work to stop. In many cases, non-compliance events are self-reported. In SDG&E’s experience, the possibility of a stop work order, and the delays and costs that

¹⁴ For example, on SDG&E’s Sunrise Powerlink Project, the Commission Decision incorporated the “Mitigation Monitoring Program” in the Final EIR/EIS, which was described in 6 pages in the Final EIR/EIS, Section I, and in a 75-page Appendix D of MMs and APMs for the approved Project. The Final MMRCP, however, is 948 pages. See <http://www.cpuc.ca.gov/Environment/info/aspensunrise/toc-mmrcp.htm>. Similarly, the MMRCP for the ECO Substation Project expanded after Commission approval – in this case, from 50 pages of mitigation measures approved by the Commission to 310 pages of mitigation measures, attachments, process, interpretation and other guidance from Energy Division and its consultants. See <http://www.cpuc.ca.gov/environment/info/dudek/ECOSUB/MMCRP.pdf>.

¹⁵ 14 Cal. Code Regs. 15097(c)-(d); See MMRCP for Sunrise Powerlink Project, pages 44-155, at <http://www.cpuc.ca.gov/Environment/info/aspensunrise/toc-mmrcp.htm>, and MMRCP for ECO Substation Project, pages 40-97, at <http://www.cpuc.ca.gov/environment/info/dudek/ECOSUB/MMCRP.pdf>.

¹⁶ Twenty-five “pre-compliance reports, permit applications and other documents” prepared prior to the construction of the ECO Substation Project are available on the Commission’s website. Available at: <http://www.cpuc.ca.gov/environment/info/dudek/ECOSUB/PreConstruction.htm>. See also Plans prepared and adopted for the Sunrise Powerlink Project at: <http://www.cpuc.ca.gov/environment/info/aspensunrise/otherdocs.htm>.

¹⁷ To illustrate, the ECO Substation Project EIR requires that SDG&E obtain CPUC, USFWS and CDFW approval of a bird nesting plan. See ECO MMRCP Mitigation Measure BIO-7j. SDG&E prepared a nesting plan, which was subsequently approved by CPUC, USFWS, and CDFW, thereby satisfying this CEQA mitigation measure. See ECO Nesting Bird Management, Monitoring and Reporting Program at http://www.dudek.com/ECOSUB/BIO_7J_Nesting%20Bird%20Management,%20Monitoring,%20and%20Reporting%20Plan.pdf. After approving the nesting plan, CPUC issued an NTP adding the requirement that SDG&E obtain CPUC concurrence of inactive nest removal, even though no such concurrence was required by the plan or the wildlife agencies.

go along with it, is a highly effective means to ensure compliance, particularly since a stop work order directly affects construction crews.

The administrative and ratepayer resources committed to undertake this level of environmental analysis, mitigation, compliance and enforcement are considerable. On the Sunrise Powerlink Project, SDG&E trained approximately 400 Native American, archeological and biological monitors, and an average of approximately 150 monitors were deployed on a daily basis during the project's peak construction, costing ratepayers approximately \$90 million. On the ECO Substation Project alone, SDG&E currently estimates that the cost of SDG&E and CPUC monitors will be \$10-12 million. This estimate does not reflect the cost of developing plans, amending permits and additional surveys that may be required.

In short, the Energy Division's rigorous program already includes redundant monitoring and enforcement of PTC/CPCN requirements. When a non-compliance event is identified, whether by SDG&E or CPUC monitors or supervisory personnel, immediate corrective action is taken to address the immediate issue and avoid a future occurrence.

III. DISCUSSION

A. The Draft Resolution Likely Will Not Achieve Its Goals

SDG&E does not challenge or dispute CEQA's mandate to mitigate or avoid significant environmental impacts where feasible. To the contrary, SDG&E works closely and regularly with Energy Division and the resource agencies to ensure compliance with the MMRCPP measures to minimize environmental impacts. But in the above context of extensive, costly and iterative mitigation monitoring and reporting requirements, SDG&E does not believe that a Citation Program, however well-intentioned, is necessary, effective, or fair. In short, SDG&E is concerned that the Citation Program will not achieve its goals.

Energy Division's stated goal for the Citation Program is to "reduce the number of compliance violations that occur by imposing fines when utilities fail to comply."¹⁸ Energy Division also claims: "This citation program enables staff to quickly address and prevent situations that may threaten human beings or sensitive environmental resources."¹⁹ Finally, Energy Division contends: "A citation program will encourage utilities to adequately educate personnel on compliance requirements before and during construction."²⁰

The Citation Program is not likely to achieve its primary goal of improving compliance and is unnecessary to achieve its secondary goals.

First, fines will deter future violations only where the violations are knowing and intentional. If a utility employee or contractor makes a mistake or has an accident that violates the MMRCPP, neither a past nor future fine will deter that mistake or accident.

¹⁸ Draft Res. at 4.

¹⁹ *Id.* at 1-2.

²⁰ *Id.* at 5.

SDG&E is not aware of any non-compliance events where the actors knew they were violating an MMRCPP requirement and decided to do so anyway. On Sunrise, the helicopter pilots who briefly intruded into golden eagle buffer zones did so inadvertently, but still were suspended indefinitely, all pilots were re-trained, buffer zones expanded, and additional observers added for “restricted flying zones.”²¹ The Sunrise helicopters that dropped load were not the result of intentional acts, and the pilots were exposed to Federal Aviation Administration penalties for doing so.²² The truck driver who tried to turn around using off-road vehicle tracks was not intentionally violating the MMRCPP.²³ Energy Division fines will not further incentivize the actors to avoid such events because the violations are not intentional.

Second, Energy Division contends that fines will incentivize utilities to adequately train project personnel on compliance obligations. SDG&E already engages in extensive training of employees and contractors working on its projects regarding MMRCPP requirements. In addition to the contractual obligation to comply with all environmental and safety requirements of local, state or federal laws and regulations, contractors also undergo project-specific training prior to construction to ensure that all project requirements are understood. This project-specific training includes training on all of the MMRCPP requirements. Even the Draft Resolution concedes: “Construction personnel are typically retrained on the environmental compliance requirements of the project while work is stopped.”²⁴ As shown by SDG&E’s responses to notices of non-compliance on the Sunrise Project, after any non-compliance event, SDG&E re-trains the relevant employees and/or contractors and has the discretion to terminate any involved individuals.²⁵ Re-training is a key corrective action where contractors or employees unknowingly violate MMRCPP requirements. Fines will not incentivize more training than already occurs before work begins, periodically during work, and as corrective action.

Third, Energy Division claims that the Citation Program will allow Staff to address “situations that may threaten human beings or sensitive environmental resources.”²⁶ Staff of the Energy Division in conjunction with the Safety and Enforcement Division already have sufficient authority through Stop Work Orders and authorization to issue fines for *safety* violations upon investigation and determination that a specific violation

²¹ February 13, 2012 Letter from SDG&E to USDA Forest Service re Response to Notice of Non-Compliance dated February 6, 2012, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

²² See, e.g., 14 CFR §§ 91.15, 13.14 and 13.11.

²³ February 21, 2012 SDG&E Final Response to Non-Compliance Report #5, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

²⁴ Draft Res. at 7.

²⁵ See, e.g., February 13, 2012 Letter from SDG&E to USDA Forest Service re Response to Notice of Non-Compliance dated February 6, 2012 (Pilot stand downs were conducted and the pilots involved in the incident were suspended from the project indefinitely); January 5, 2012 SDG&E Final Response to Non-Compliance Report #3 (re-training was conducted and the ground crew member at fault was reprimanded); and January 11, 2012 SDG&E Final Response to Non-Compliance Report #4. All available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

²⁶ Draft Resolution at 1-2.

actually occurred.²⁷ A Stop Work Order – which directly impacts construction crews – would be far more effective in addressing an intentional violation of an MMRCP requirement that poses an immediate threat than writing a citation for a monetary fine. More effective still would be providing notice of an alleged non-compliance to an SDG&E representative, who could then implement corrective action under threat of a Stop Work Order. If a utility ever ignored a Stop Work order, an OII would be appropriate to determine the circumstances in question and the appropriate penalties if appropriate. However, in such a hypothetical case, citation authority would not change the outcome.

Accidental violations usually are caused by either a lack of communication (a contractor is unaware that a necessary approval was not yet received), a lack of information (inadequate marking on a buffer zone), or a simple mistake (following an off-roader's vehicle track rather than the approved access road), or a difference in interpretation of the MMRCP requirements. Training is the best response; SDG&E provides training initially and often during a project. Compliance, not fear of fines, drives training.

In sum, the Citation Program will not incentivize compliance for unknowing and unintentional violations; existing tools of Stop Work Orders and OIIs can address the rare (if any) cases of knowing and intentional non-compliance.

B. The Draft Resolution Almost Certainly Will Increase Ratepayer Costs and Further Delay Projects

The Draft Resolution identifies the estimated cost of the Citation Program as “none.”²⁸ This is speculative and highly unlikely. SDG&E hires construction firms that specialize in utility infrastructure construction to build most of the projects approved by PTC or CPCN and requires these contractors to comply with all local, state and federal environmental and safety requirements, such as the Commission's requirements (including the MMRCP). SDG&E's contracts require these contractors to indemnify SDG&E for costs incurred by the acts of the contractor's employees. These provisions place the financial responsibility on the direct employer, which has the greatest ability to manage its employees on all aspects of the job, including compliance with the MMRCP.

The Citation Program will add the risk of fines to the contractors' potential costs of performing the work. Contractors can be expected to adjust their bid prices upward to reflect that risk. This additional cost might be appropriate for ratepayers to bear if it increased compliance with the MMRCP. However, such fines will not prevent unintentional violations of the MMRCP and contractors (along with SDG&E) already provide extensive employee training. The extent of the price increases will depend on contractors' analysis of the risk. Is a truck driver trying to turn around on an off-road vehicle track, and leaving tire tracks in the desert, a single day violation with no harm (\$500) or a multi-day violation extending until the affected land is restored?²⁹ Will an

²⁷ See, <http://www.cpuc.ca.gov/PUC/aboutus/Divisions/Consumer+Protection/Utilities+Safety+Branch/>; See also, <http://www.cpuc.ca.gov/PUC/aboutus/Divisions/Consumer+Protection/Enforcement+Branch/>

²⁸ Draft Res. at 1.

²⁹ February 21, 2012 SDG&E Final Response to Non-Compliance Report #5, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

overly wide access road or use of a turn-around, based on a mistaken interpretation of an agency requirement, result in single-day fines or fines based from date of use until the date when the agency informed SDG&E of the error and SDG&E took corrective action?³⁰ What does the Citation Program mean by harm to a “resource”? Neither SDG&E nor the contractors know how the Citation Program would apply and it is highly likely that each Staff member will have a different measure for implementing the Citation Program, only adding to the uncertainty. The prices bid for project work will reflect that uncertainty, and thus impose further costs on ratepayers for little, if any, reduction in already rare non-compliance events.

The risk of fines of uncertain magnitude may also drive contractors and utilities to not undertake even apparently uncontroversial work without written authorization from Energy Division. If Staff assigned to the project is not available or unwilling to approve work, such work may be deferred until the utility has documented its efforts to comply and to obtain Staff concurrence. Project delays will drive up costs and may impair timely completion of projects.

C. The Citation Program Will Likely Increase Administrative Burdens on Staff and Utilities

The Draft Resolution suggests that the Citation Program will “conserve limited staff resources” because “a lengthy investigative process is unnecessary” and “Staff already identify and document non-compliance issues for projects, therefore, a citation program can be implemented with little additional time.”³¹ As discussed more below, the Citation Program is not likely to conserve Staff resources because, rather than focus on identification and correction of what Staff perceive as non-compliance events, with collaboration in the field, utilities will have to prepare to litigate whether a violation has occurred, for how long, and whether there has been “harm” to human beings or a “resource.” Because Staff are not required to give a utility notice of an alleged violation or an opportunity to cure it, and are not required to hear the utility’s side before issuing a citation, utilities will be forced to appeal simply to obtain a fair hearing on the issues. Since assigned Staff will not always be experts in the particular field at issue, Staff will likely review the issue carefully with their consultant. This consultation will necessarily take time and impose additional costs. Further, the provision exposing utilities to “any remedy available” if they appeal ensures that all appeals will result in a full presentation of witnesses and other evidence.

And in an effort to avoid later questions of interpretation, utilities will participate even more actively than they currently do during the earlier stages of approval – such as during the Energy Division’s CEQA review process and in the development of the MMRCPP – to ensure that compliance uncertainties and risks are minimized. Where misinterpretation is still likely after adoption of the MMRCPP, utilities will have to try to obtain Energy Division concurrence on interpretations in the field, before work is

³⁰ October 27, 2011 Letter from USDA Forest Service to SDG&E re Non-Compliance with Terms of Special Use Permit, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

³¹ Draft Res. at 6-7.

performed. These efforts will impose additional administrative burdens, costs and delays for both Energy Division and the utilities.

Thus, the Citation Program is more likely to consume Staff and utility resources than conserve them.

D. The Draft Resolution Will Not Increase Public Safety or Protect the Environment

Although cited as partial justification for the Citation Program, the Sunrise Powerlink Project in fact demonstrates that an extraordinarily large project can be constructed *without* significant impacts to environmental resources or public safety.³² In response to limited non-compliance events, SDG&E instituted a host of actions intended to increase communication and assure that only qualified individuals conducted work in sensitive habitat areas, for example.³³ Although inadvertent mistakes or lack of information led to a limited number of events of non-compliance with mitigation measures, the Sunrise Project did not result in any harm to wildlife and only minimal impacts to vegetation.³⁴ The project did not result in any impacts to public safety.

E. The Draft Resolution Poses the Risk of Conflict with Decisions of Agencies with Specific Jurisdiction

As discussed above with respect to the Sunrise Project, utility infrastructure projects frequently require a variety of other permits from federal and state agencies.³⁵ These agencies have specific jurisdiction over certain resources and/or activities, for example U.S. Fish & Wildlife Service (USFWS) and California Department of Fish & Wildlife (CDFW) have specific biological expertise and authority over certain bird species.³⁶ Yet Energy Division incorporates these agencies' requirements into the MMRCPP and requires Staff concurrence even if USFWS and CDFW are satisfied. Under the Citation Program,

³² See, e.g., November 3, 2011 SDG&E Final Response to Non-Compliance Report #2, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550> (although there were incursions into Peninsular Bighorn Sheep avoidance areas no sheep were harassed or harmed as a result of the violation); and February 7, 2012 Letter from SDG&E to USDA Forest Service re Response to Notice of Non-Compliance dated February 2, 2012. See also, e.g., February 21, 2012 SDG&E Final Response to Non-Compliance Report #5 (a truck turnaround conducted outside the ROW resulted in some disturbance on both sides of the access road but no disturbance of vegetation, wildlife, or artifacts). All available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

³³ October 27, 2011 CPUC Non-Compliance Report #2 and November 3, 2011 SDG&E Final Response to Non-Compliance Report #2, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

³⁴ See, e.g., November 3, 2011 SDG&E Final Response to Non-Compliance Report #2 (although there were incursions into Peninsular Bighorn Sheep avoidance areas no sheep were harassed or harmed as a result of the violation); and February 7, 2012 Letter from SDG&E to USDA Forest Service re Response to Notice of Non-Compliance dated February 2, 2012. See also, e.g., February 21, 2012 SDG&E Final Response to Non-Compliance Report #5 (a truck turnaround conducted outside the ROW resulted in some disturbance on both sides of the access road but no disturbance of vegetation, wildlife, or artifacts). All available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

³⁵ See, e.g., Sunrise MMRCPP at 21-26, 44-176; see also Plans listed at: <http://www.cpuc.ca.gov/environment/info/asp/sunrise/otherdocs.htm>.

³⁶ See, e.g., 16 U.S.C. § 704; 50 CFR §10.1; and Cal. Fish and Game Code §1802.

Staff could elect to find a violation and impose fines even if the agencies with expertise and jurisdiction find no violation or exercise discretion to not pursue enforcement.

Depending upon the specific event, and the authorizing statutes, the agencies' specific jurisdiction may "occupy the field" and thereby preempt Energy Division's claimed authority to levy fines based upon an alleged violation of another agency's requirements. Putting another agency's requirements into an MMRCPP may not give Energy Division authority to act where the Commission would be preempted from doing so directly. Even if not preempted, Energy Division should defer to agencies with specific expertise and jurisdiction.

F. The Citation Process is Flawed

Under the Draft Resolution, Energy Division would not only draft the MMRCPP, but also: (a) decide how to interpret each MM, APM, or requirement of an included plan; (b) conduct whatever fact-gathering Staff deem adequate; (c) decide whether to issue a citation; and (d) decide what type of citation to issue and what fine to levy. At no point in this process is there any required notice to the affected utility or an opportunity for the affected utility to be heard on the facts of the alleged violation. To obtain a neutral review of whether a violation occurred, the affected utility must file an ex post appeal for an evidentiary hearing before an ALJ.

According to Energy Division: "Non-compliance violations are fact-based and can be determined without lengthy investigation,"³⁷ and "A citation program standardizes the process, so that a lengthy investigative process is unnecessary."³⁸ To the contrary, when Staff seek to levy financial penalties for alleged violations of "Construction Requirements," rather than achieve corrective action to meet Staff's concerns, a careful determination of the relevant facts should be a priority—including notice to, and an opportunity to be heard for, the affected utility.

Flaws in the proposed Citation Program include:

- **Energy Division Is Not Required To Inform The Affected Utility That Staff Believe A Violation Is Occurring Or Has Occurred.** If Energy Division's goal is to reduce non-compliance to protect the public or the environment, immediate notice of suspected non-compliance and a chance to cure the claimed violation should be required before imposition of any fine.
- **Energy Division Is Not Required To Provide The Affected Utility A Chance To Be Heard Regarding An Alleged Violation Before A Citation Is Issued.** Certainly, there will be circumstances where Staff might be unaware of relevant facts. During construction of the Sunrise Powerlink Project, SDG&E noted some instances where the opportunity to provide additional information to the agency may have altered the decision to issue a non-compliance report.³⁹ There will also

³⁷ Draft Res. at 7.

³⁸ *Id.*

³⁹ See November 2, 2011 SDG&E Final Response to Non-Compliance Report #1, available at: <http://www.sdge.com/regulatory-filing/4611/resolution-e-4550>.

be instances where the utility’s understanding of an MMRCP requirement might be relevant to Staff’s determination or at least influence Staff’s discretion. By providing due process rights only through appeal, the proposed Citation Program makes appeals far more likely, thus undercutting Energy Division’s claim that the Program will “conserve limited staff resources.”^{40,41}

- **The Citation Program Is Vague And Overbroad Regarding What May Trigger A Fine.** A “Specified Violation” is defined as a violation of “Construction Requirements,” which in turn is defined as “[r]equirements in a [PTC], [CPCN], or [MMRCP].”⁴² This definition is not limited to the Ordering Paragraphs of the Commission’s CPCN/PTC Decisions, leaving utilities to guess at how Energy Division might interpret any portion of a Decision’s text. The definition is not limited to requirements of Commission-approved Mitigation Measures and Applicant Proposed Measures, but all of the MMRCP and its numerous attached or incorporated Plans.⁴³ Does the Commission intend that Energy Division levy fines for a failure to update distribution lists to Energy Division’s satisfaction,⁴⁴ or for a perceived failure of a utility employee to “[c]ommunicate corporate coordination”?⁴⁵
- **The Citation Program Will Impose Additional Administrative Burdens And Costs On Staff And The Utilities.** Proposed Section 2.7 states that, if a utility appeals, “any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Fine.” This appears designed to deter utilities from challenging the Energy Division’s determinations—made “without lengthy investigation” and without utility input. It likely will have the unintended consequence of forcing utilities to treat every citation appeal as equivalent to an OII, presenting a full evidentiary case, including witnesses and experts, on every alleged violation, rather than simply seeking an impartial review by an ALJ with a level of effort consistent with the fine.
- **Cost Impacts On Utilities And Shareholders Are Vague.** Proposed Section 2.7.6 states that representation at an appeal “shall be at Respondent’s expense.”

⁴⁰ Draft Res. at 10.

⁴¹ Today, the phrase “due process” usually refers to one of two sets of rights. The first is substantive due process, which includes rights related to personhood, like the right not to be discriminated against. The second is “procedural due process,” which governs how legal proceedings must be carried out. Moreover, the U.S. Supreme Court has held that the core procedural due process rights are the rights to notice and a hearing. In other words, in any legal or administrative proceeding, any person or entity who might be negatively affected by the outcome of the proceeding has the right to be told that the proceeding is going to take place, the right to appear before a neutral judge or arbiter, and the right to explain his or her side of the case before a decision is made. This right applies to all types of government-related cases, from administrative decisions to civil cases to full-fledged criminal trials. It applies to cases that involve all federal, state, or local government units.

⁴² Draft Res., Appendix A at Section 1.0 fn. 3.

⁴³ See Sunrise Final MMRCP <http://www.cpuc.ca.gov/environment/info/aspen/sunrise/toc-mmrcp.htm>. For the additional required plans, and their requirements, see also,

<http://www.cpuc.ca.gov/environment/info/aspen/sunrise/otherdocs.htm>.

⁴⁴ Sunrise MMRCP at 31.

⁴⁵ Sunrise MMRCP at 12.

This is ambiguous. If it means that the Commission will not pay, that is unsurprising. If it means that the affected utility may not include the costs of appealing potentially invalid citations in its costs of doing business, it is an effort to deprive the affected utility of its procedural due process right to defend itself.

For the reasons discussed above, the proposed Citation Program is unlikely to achieve Energy Division's goal of achieving perfect compliance with MMRCs (because utilities do not intentionally violate MMRC compliance now). Instead the proposed Citation Program is more likely to drive up infrastructure project costs (as contractors factor the risk of fines in their bids for project work) and consume more Staff resources (as utilities seek MMRC clarifications, pre-work clearances, and are forced to make detailed evidentiary presentations to an ALJ rather than discuss corrective action with Staff).

Other than an appeal to an ALJ, the proposed Citation Program contains no due process. There is no notice requirement, no opportunity to cure, no cap on penalties or criteria for imposing penalties. The lack of protections, or consideration of how the program might be structured to further encourage compliance, suggests that the Draft Resolution is premature. Had the Commission, with stakeholder input, developed a record regarding the extent and causes of non-compliance, it might have found constructive ways to structure a Citation Program to better promote the Commission's goals without unnecessarily increasing ratepayer costs. For example:

- Energy Division would be required to provide a utility with notice of, and a reasonable opportunity to cure, alleged violations. SDG&E takes pride in its environmental record. SDG&E would prefer to expend its resources on corrective action desired by Staff than preparing its defense against claimed violations.
- "Specified Violations" would be limited to "knowing and intentional" of Construction Requirements. Imposing fines for unknowing and unintentional violations will not deter the next unknowing and unintentional violation—and thus there is no offsetting benefit to the added project cost and consumption of Staff resources arising from citations for such violations. To the extent that Energy Division seeks "more" training about MMRC requirements, the MMRCs and Plans already require training, corrective action often involves "more" training, and a refusal to require more training as corrective action would be a knowing and intentional violation.
- "Construction Requirements" would be limited to the Commission's Order for the project, and the Commission-approved Mitigation Measures. "Construction Requirements" would not include other agencies' permits, which should be left to the jurisdiction and enforcement authority of those agencies.
- Any proposed citations would require the explicit approval of the Energy Division Director and review by Legal Division.
- On appeal of a citation, the maximum penalty would be the Scheduled Fine and the reviewer should have discretion to propose a lower fine. This would allow utilities and Staff to apply a level of effort appropriate to the amount of the fine.

III. CONCLUSION

SDG&E respectfully submits that the proposed Citation Program will not prevent the occasional event of mistaken non-compliance, but will drive up infrastructure project costs with no corresponding ratepayer benefit. Energy Division has written extremely detailed MMRCs, enforced by extensive monitoring and Energy Division staff sign-offs on work plans, and SDG&E devotes significant resources to compliance. When non-compliance events are identified, corrective action is taken. Imposing fines will not eliminate the rare error, but likely will increase costs as contractors price their work to compensate for the risk of paying fines for their occasional mistakes. If Energy Division is aware of knowing and intentional non-compliance by a utility, the appropriate remedy – and the most effective tool to promote compliance – is a Stop Work Order and/or an OII.

For all of the foregoing reasons, SDG&E respectfully requests that the Commission deny the request to adopt the Citation Program. In the alternative, SDG&E respectfully requests that the Commission decline to adopt the Citation Program until the necessary record can be developed to ensure that any such Program would in fact promote compliance without increased and unnecessary project delays, administrative burdens, and costs to ratepayers and CPUC staff.

Dated in San Diego, California, this 18th day of March, 2013.

Respectfully submitted,

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