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DOCKET	
04-AFC-1	
DATE	<u>AUG 16 2006</u>
RECD.	<u>AUG 18 2006</u>

State of California
Energy Resources Conservation
and Development Commission

In the matter of)	Docket No. 04-AFC-1
)	
)	
San Francisco Electric Reliability Project)	
Power Plant Licensing Case)	Reply to applicant's motion to have
)	Portions of Intervenor Sarvey's Brief
)	treated as public comment. 8-2-06

8-16-06

DATE

Pursuant to § 1716.5 of the rules of practice and procedure Intervenor

Sarvey hereby responds to the applicants motion of August 2, 2006 "Motion of the City and County of San Francisco to have portions of Intervenor Sarvey's Reply Brief and "Reply brief to Staff's late filing" treated as public comment."

The applicant filed on August 2, 2006 a motion that essentially is a reply brief. All reply briefs were due by close of business on July 10, 2006. (5/31/06 RT 269.)

The applicant has done far more than try to classify certain elements of my brief as public comment the applicant has attempted to rebut portions of my reply brief and disguised this rebuttal as a motion. For example, in comment one the applicant states that I have used a reference form the CARB website which is not in evidence while she does the same on page 6 of her reply brief. Then she goes on to provide reply comments and citations to the record that the CARB Website reference is not relevant because staff has concluded that the emissions are significant (Exhibit 46 at 4.1-29), and that the applicant is mitigating precursors at a one to one ratio (Exhibit 15 at 8.1-50), and finally states that I failed to include the fact that there are no ozone exceedances in the San Francisco. These are all reply comments to my briefs that the applicant is attempting to provide in the guise of a motion. The applicant is obviously in disagreement with the committee's order of July 13, 2006 granting all parties the opportunity to reply to staff's late filed reply brief. The committee is fully capable of identifying and classifying the evidentiary record and needs little help from the applicant. The applicant in this motion attempts to limit my use of previous commission testimony and decisions and publicly available information while at the same time encourages the committee to take official notice of publicly

available information and previous commission proceedings in her brief. Some examples of this are on page 16 and 51 of the applicants opening brief and on pages 6 and 8 of the applicants reply brief. During a proceeding the commission may take official notice of any generally accepted matter within the commission's field of competence. Title 20 Section 1203 (c). I hereby petition the committee to deny the applicants Motion of August 2, 2006 and retain their ability to analyze the evidence at their discretion. In the following pages I provide a response to the applicant's comments on the classification of my reply comments.

Applicant Reply Comment #1

- Page 3, lines 24-26. Contains references to an Air Resources Board document that is not in evidence. The information in question was not in existence at the time of the evidentiary hearings; however, it is not relevant since staff concluded that the emissions of NO_x and VOC from the project do have the potential to contribute to higher ozone levels if not mitigated. Exhibit 46 at 4.1-29. Thus, the City is mitigating its ozone precursor emissions at a ratio of 1.0:1. See Exhibit 15 at 8.1-50. Further, the information cited by Mr. Sarvey neglects to reflect the fact that the Air Resources Board website cited shows no ozone violations for the City of San Francisco in 2006.

Response: The applicant objects to the use of data from the CARB website that was not introduced at the evidentiary hearing and yet the applicant attempted to introduce information from the CARB website in her reply brief on page 6.

“Second, with respect to the high ozone level, Mr. Sarvey selectively presented to the Committee a sheet of paper from the California Air Resources Board’s web site showing that the maximum hourly ozone level measured at the BayCAMP monitoring station in 2004 was 0.096 parts per million – just above the cutoff level of 0.095 parts per million for the state air quality standard.¹ CCSF asks the Committee to take official notice, from the same California Air Resources Board's web site referenced by Mr.

Sarvey, that on exactly the same day when the BayCAMP monitoring station recorded a value of 0.096 parts per million, the measurement at the BAAQMD Arkansas Street station was 0.093 parts per million – almost the same value as was recorded at the BayCAMP station.²

¹ The state 1-hour average ambient air quality standard for ozone is 0.09 ppm; a measured value of 0.095 ppm or higher can constitute an exceedance of the standard.

² <http://www.arb.ca.gov/adam/cgi-bin/db2www/adamtop4b.d2w/Branch>

(Applicant Reply Brief page 6)

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The applicants objection to my use of CARB data is hypocritical and clearly just a method to supply a reply brief where no opportunity exists. The Ozone violation at the Hunters Point Monitoring Station that was recorded on October 12, 2004 was the first one hour ozone violation recorded in San Francisco since 1985. No monitoring data is available before then.

<http://www.arb.ca.gov/adam/cgi-bin/db2www/polltrends.d2w/Branch> The

committee can take official notice of these facts at their discretion. (Title 20 Section 1203 (c))

Applicant Reply comment #2

- Page 10, lines 8-18. Asserts facts not in evidence: that there will be meaningful nitrogen deposition on San Bruno mountain from generating units that replace the Hunters Point and Potrero Power Plants. In fact, the only evidence on this point is to the contrary. See 5/31/06 RT (Rubenstein) at 136-7.

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Response: This statement is not an attempt to classify anything as public

comment but is merely a reply to my reply brief disguised as a motion. The applicant also attempts to mischaracterize my comments in my reply brief with this statement. My comments were as follows:

“Secondly the closure of both the Hunters Point Power plant and the Potrero Power plant are going to require that generation somewhere else will be required which may impact San Bruno Mountain or some other serpentine habitat more than the two existing facilities. A prime example is the turbine that must be sited at the airport to allow the action plan to **possibly** close the Potrero 3 unit. Those nitrogen and ammonia emissions are closer to the mountain and may impact it more than existing generation. The generation at Potrero and Hunters Point must be replaced by some other generation somewhere and the nitrogen impacts from that generation may possibly inflict greater damage to the environment than the existing Potrero unit or the now non operational Hunter Point unit. “
(Intervenor Sarvey Reply Brief page 10)

Applicant Comment #3

- Page 23, first full paragraph. There is a purported reference to Mr. Lee's prefiled testimony in the Potrero 7 proceeding. The City's testimony in the Potrero 7 proceeding is not in the evidentiary record of this case. Mr. Sarvey repeatedly attempted to introduce this testimony into the record but these attempts were denied. Mr. Sarvey indicated that his purpose in attempting to introduce the Potrero 7 testimony was to demonstrate the existence of LORS. 4/27/06 RT (Sarvey) at 214: 9-16; 5/31/06 RT (Sarvey) at 64: 4-8. The City repeatedly objected. 4/27/06 RT (Solé) at 158: 8-9 and 213: 20-21; 5/31/06 RT (Solé) at 63-64. Mr. Sarvey repeatedly agreed to rely on administrative notice of LORS rather than insist on the introduction of testimony or prehearing conference statements from the Potrero 7 case. 4/27/06 RT (Sarvey) at 215: 5-21; 5/31/06 RT (Sarvey) at 6-15. Hearing Officer Fay clarified during the April 27 hearing that documents other than Mr. Sarvey's hazardous materials testimony were not received into evidence. 4/27/06 RT (Fay) at 218:23-4. Hearing Officer Fay also clarified during the May 31 hearing that the Commission could take administrative notice of the City's LORS but not the contents of the Potrero 7 documents. 5/31/06 RT (Fay) at 67: 20-22. During the April 27 hearing, Mr. Sarvey argued that the Potrero 7 testimony had already been introduced into the record by the City. However, as explained in the City's opening brief, at pages 111-12, footnote 15, the data response in question number 5 was not submitted into evidence by the City and was not otherwise introduced. Earlier that day, the responses to San Francisco Community Power data requests 1 and 3 were admitted into the record as Exhibit 83. 4/27/06 RT 62-63. Mr. Sarvey uses Exhibit 83 to label the testimony of Mr. Lee but Mr. Lee's testimony was provided in response to data request 5 as Mr. Sarvey himself admitted. 4/27/06 RT (Sarvey) at 213: 16-19.

Response: Hearing officer Fay allowed me the opportunity to argue that Mr. Lee's testimony is part of the evidentiary record. (RT 4-27-06 p. 220 lines 6-9).

I requested Mr. Lee's presence at the Prehearing Conference. (RT page 55 lines 21-23) The applicant did not provide him so he was unavailable. The rule for prior testimony of the witness is that the witness has to be unavailable. I presented his testimony from a previous siting case and under the rules of evidence it can be introduced. The applicant should have provided Mr. Lee as he is still an Employee of CCSF. Regardless his testimony is part of the administrative record. (Docket # 32141 Responses to San Francisco community

Power data request 1-5) and agrees with the undisputed testimony of my Environmental Justice expert Francisco Da Costa

Applicant Comment #4

- Page 24, lines 5-10. Contains references to Exhibit 96, the Electricity Resource Plan, which was marked for identification purposes only on May 31, 2006. (5/31/06 RT. at 159-161.) The reference states as follows: Exhibit 96 page RMI 145. There is no such page. The Electricity Resource Plan only has 72 pages.

Response: The Electricity Resource plan is predicated on an analysis conducted by the Rocky Mountain Institute which accompanies the plan on the city's website. (http://sfwater.org/Files/Reports/144_end_ERIS_report_v11.pdf) The reference to the Electricity Resource plan RMI page 145 is to the Rocky Mountain Institute analysis that states, ""The emission values for purchased imports are averaged values from all of the generating resources available in California. Note that the emission rates for power supplied region-wide in the Western U.S. would be much higher, because of the dominance of coal in the regional generation mix. (Exhibit 96 Rocky Mountain Institute Analysis page 145)

Applicants Reply Comment #5

- Pages 24 lines 18-22, and Page 26 lines 2-4. Contains a reference to the world climate website and the "weather reports" website. Neither of these references are part of the evidentiary record. If Mr. Sarvey wished to use these materials, he should have sought to introduce them during the evidentiary phase of the proceedings when the City and its witnesses would have had an opportunity to address Mr. Sarvey's claims about the materials and what they show. The materials in question were in existence at the time the evidentiary hearings took place.

Response: The Applicant here takes issue with the use of publicly available information that is accompanied with a website address. During a proceeding the commission may take official notice of any generally accepted matter within the commission's field of competence. Title 20 Section 1203 (c). If we were to adjudicate every publicly available fact the hearing could last for several years rather than a few days. The applicant also uses publicly available information in her brief. The applicant is attempting to deny me the right to utilize publicly available information and they have utilized it extensively in their briefs

Applicant Comment #6

- Page 27, line 22. There is a purported reference to Ms. Fox's testimony in the Potrero 7 proceeding. Please review the discussion above regarding the City's prefiled testimony in the Potrero 7 proceeding. Exhibit 63, which Mr. Sarvey references in his reply brief, is the City's prehearing conference statement in Potrero 7. Mr. Sarvey's attempt to introduce this document into the evidentiary record in this case was denied. 5/31/06 RT at 63.

The committee is fully aware that the prefiled testimony of Ms. Fox is not in the evidentiary record. It does not need a supplementary reply brief by the applicant to inform them of that. There is nothing preventing anyone from citing the administrative record to support a point in the evidentiary record. In this case

my testimony is that SO2 ERC's are not adequate to offset local PM 2.5 impacts. The applicant hired a witness Phyllis Fox in the Potrero 7 siting who prepared testimony that SO2 ERC's were not effective or capable of mitigating local PM 2.5 impacts agreeing with my testimony. This demonstrates that the applicant can hire whatever expert they want to say whatever they want. Ms. Fox's testimony is part of the administrative record (Docket # 36762)

Applicant Comment # 7

- Page 27, line 8-9. Asserts facts not in evidence: "This has been estimated to be around \$800,000 by Mr. Ngo."

Response: Mr. Ngo proposed \$800,000 as a reasonable amount to offset the applicants PM 2.5 emissions after the application of the street sweeping program. His filed testimony states "Staff estimates that the City would have to subsidize replacement or modification of approximately 107 wood stoves (93 lbs/unit) or 961 fireplaces (10.4 lbs/unit) to generate 5 TPY of PM2.5. (Exhibit 26 page 4.1-21)

Applicant Reply comment #8

- Page 5, lines 14-16. Contains references to an Air Resources Board document that is not in evidence. The information in question was not in existence at the time of the evidentiary hearings; however, it is not relevant since staff concluded that the emissions of NO_x and VOC from the project do have the potential to contribute to higher ozone levels if not mitigated. Exhibit 46 at 4.1-29. Thus, the City is mitigating its ozone precursor emissions at a ratio of 1.0:1. See Exhibit 15 at 8.1-50. Further, the information cited by Mr. Sarvey neglects to reflect the fact that the Air Resources Board website cited shows no ozone violations for the City of San Francisco in 2006.

See response to comment 1. Perhaps the applicant would rather I raise this issue on reconsideration since the applicant feels it is improper to cite information that was not available at the evidentiary hearing. The information in question shows that staff's summary of projections analysis is clearly erroneous. The commission cannot rely on evidence that is clearly erroneous.

Applicant Reply Comment # 9

- Page 11, lines 21-23. Contains a reference to www.weatherreports.com which is not in evidence. If Mr. Sarvey wished to use these materials, he should have sought to introduce them during the evidentiary phase of the proceedings when the City and its witnesses would have had an opportunity to address Mr. Sarvey's claims about the materials and what they show. The materials in question were in existence at the time the evidentiary hearings took place.

Response: See response to comment #5

Applicant Reply comment # 10

- Page 11, lines 26-27 and most of page 12. Contains references to the record in licensing case for the Los Esteros Project (03-AFC-02). The materials referenced are not in the evidentiary record for the SFERP. If Mr. Sarvey wished to use these materials, he should have sought to introduce them during the evidentiary phase of the proceedings when the City and its witnesses would have had an opportunity to address Mr. Sarvey's claims about the materials and what they show. The materials in question were in existence at the time the evidentiary hearings took place.

Response: The matters raised here are in the evidentiary record of the Los Esteros Siting case (03-AFC-02). The applicant first raised the issues in the Los Esteros case in her opening brief on page 51 asking the commission to take judicial notice of a limited statement in the decision. The applicants witness Gary Rubenstein has a clear history of exaggerating the effectiveness of the mitigation programs he proposes. In the Los Esteros Project (03-AFC-02) Mr. Rubenstein claimed that the applicant's (Calpine) wood stove program provided over 1900 tons of PM-10 reductions and the CEC Staff and the BAAQMD calculated the reductions as 6.8 tons per year less than 1% of Mr. Rubenstein's claims. In this proceeding Mr. Rubenstein is claiming that a daily advanced street sweeping program on 9.6 miles of road will eliminate 24 tons of particulate matter a year. On the Air Resources Board Website in a document titled "Methods to Find the Cost Effectiveness of Funding Air Quality Projects" there is a section where the ARB examines the effectiveness of a Rule 1186 advanced street sweeper. On page 12 of that document is a section entitled the Emission benefit factor for rule 1186-Certified Sweepers and it is presented below.

Emissions Benefit Factor for Rule 1186-Certified Sweepers

Rule 1186-certified street sweepers tested in July of 1999 had an average entrainment value of 109 milligrams per meter (mg/meter). During those same evaluations, the non-certified street sweepers had an entrainment value of 340 mg/meter. Based on these evaluations, the net benefit of using a Rule 1186-certified street sweeper is 231 mg/meter; however, this value has been reduced to account for the fact that the silt loadings used in the test are greater than typical paved road loadings. With this reduction factor and the appropriate conversion, the net benefit from using Rule 1186-certified street sweepers is estimated at **0.05 pounds/mile** of street sweeping. This benefit factor is used in the formula below to calculate reductions from sweeping with Rule 1186-certified street sweeping.

<http://www.arb.ca.gov/planning/tsaq/eval/eval.htm>

According to the ARB document the net benefit of the Rule 1186 street sweeper is .05 pounds/mile. If the 9.6 miles of road is swept everyday that is total of 3,504 miles of road swept each year. When you multiply the ARB accepted benefit factor of .05 pounds/mile the applicants advanced street sweeping program will only eliminate 175.2 pounds per year of PM-10 which is less than 1 percent of the applicants claimed reduction of 24 tons per year. . I request official notice of Mr. Rubenstein's previous testimony in another Commission proceeding.

Applicant Reply comment #11

- Page 13, lines 6-12. Contains references to the record in licensing case for the Los Esteros Project (03-AFC-02). The materials referenced are not in the evidentiary record for the SFERP. If Mr. Sarvey wished to use these materials, he should have sought to introduce them during the evidentiary phase of the proceedings when the City and its witnesses would have had an opportunity to address Mr. Sarvey's claims about the materials and what they show. The materials in question were in existence at the time the evidentiary hearings took place.

Response: This first comment is directly out of staffs reply brief page 4 lines 1-4. The Information presented on the woodstove program is from Staff's testimony in the Los Esteros Project and is referenced in Staff's Reply Brief on page 4. The information is germane to this project. I request official notice of this previous testimony in the evidentiary record of the Los Esteros Project (03-AFC-02) contained on page 13 lines 6-12 of my reply brief to staff's late filed brief.

Applicant Reply comment #12

- Page 13, lines 16-19. Cites to facts not in evidence: "The applicant has estimated that the local SO₂ credits required by staff in ASQC-12 will cost the applicant \$400,000 alone including any contributions the applicant wishes [SIC] to provide in AQSC-11."

Response: The average cost of a ton of SO_x in the State of California is \$44,589.

2005 Summary Statistics For a Total of 18 SO_x Transactions*

	\$/ton	Tons
Total Tons Traded		75.01
Average (mean)	\$52,456	
Median	\$44,589	
High	\$167,123	
Low	\$1,000	

* Excludes asset transfer, subsidiary, barter, and other non-monetary transactions.

<http://www.arb.ca.gov/nsr/erco/ercrpt05.pdf>

Applicant Reply Comment #13

- Page 14, lines 3 –14. Cites to "testimony" without references and that was not provided. Mr. Sarvey is free to characterize his current position in this matter in his pleadings but he cannot on brief change his sworn testimony.

Response: *I appreciate the applicant allowing me to characterize my current position as they have spent considerable ink in their briefs mischaracterizing it.*

Applicant Comment #14

- Page 15, lines 7 through the end of the page and through Page 16, Table DR3-1. Contains references to the record in licensing case for the Los Esteros Project (03-AFC-02). The materials referenced are not in the evidentiary record for the SFERP. If Mr. Sarvey wished to use these materials, he should have sought to introduce them during the evidentiary phase of the proceedings when the City and its witnesses would have had an opportunity to address Mr. Sarvey's claims about the materials and what they show. The materials in question were in existence at the time the evidentiary hearings took place.

Response: This is the same emissions data I provided to the BAAQMD on my comments on the PDOC for the SFERP when they lowered the allowable PM 2.5 limit. I asked the applicants air quality witness at the hearings to supply us with PM 2.5 emissions data for a LM -6000 turbine and he refused and said I had already supplied this data to the BAAQMD. (RT 5-22-06 p.273 lines 5-10)

5 A I believe that you provided some of my
6 data supporting that conclusion in your comments
7 submitted to the Bay Area District on the PDOC
8 last year when you encouraged them to reduce the
9 particulate levels from 3 down to 2.5 pounds per
10 hour.

. (RT 5-22-06 p.273 lines 5-10)

The data I have supplied here is from an exhibit from the Los Esteros Critical Energy Facility and it will be helpful to the committee since this data was generated by the applicants witness Gary Rubenstein and is referred to in the evidentiary record. (RT 5-22-06) I request official notice of Mr. Rubenstein's previous testimony in another proceeding.

Applicant Reply Comment #15

- Page 17, lines 12-16. Contains references to an Air Resources Board document that is not in evidence. If Mr. Sarvey wished to use these materials, he should have sought to introduce them during the evidentiary phase of the proceedings when the City and its witnesses would have had an opportunity to address Mr. Sarvey's claims about the materials and what they show. The materials in question were in existence at the time the evidentiary hearings took place.

Response: The information presented is Exhibit 69 received into evidence on May 31, 2006.

Applicant Reply Comment #16

- Page 17, last 4 words, and Page 18, entire page. Refers to studies and their conclusions which are neither identified or part of the evidentiary record in this case.

Response: Is the applicant arguing that PM 2.5 is benign or that the EPA has not promulgated new regulations to control particulate matter? See Exhibit 46 pages 4.1-13, 14.

Applicant Reply Comment #17

- Page 18 last three lines, Page 19 through middle of the page. Makes factual assertions that are not in evidence and provides no references. For example, Mr. Sarvey represents, without any reference to the evidentiary record in this case, the beliefs of the U.S. EPA, ARB, South Coast Air Quality Management District and San Luis Obispo Air District.

Response: See Exhibit 78 pages 26-28, RT 5-31`-06 page 37, Exhibit 46 pages 4.1-13, 14.

Applicant Reply Comment #18

- Page 24, lines 6-16. Asserts facts not in evidence: that there will be meaningful nitrogen deposition on San Bruno mountain from generating units that replace the Hunters Point and Potrero Power Plants. In fact, the only evidence on this point is to the contrary. See 5/31/06 RT (Rubenstein) at 136-7.

Response: See Reply to comment #2.