

**DOCKET**

**04-AFC-1**

DATE Aug 28 2006

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**STATE OF CALIFORNIA  
Energy Resources Conservation and Development Commission**

In the Matter of: )  
 )  
Application for Certification )  
For the San Francisco )  
Electric Reliability Project )

Docket No. 04-AFC-01

**REPLY OF THE CITY AND COUNTY OF SAN FRANCISCO TO INTERVENOR  
SARVEY'S REPLY**

The City and County of San Francisco (CCSF or City) respectfully submits this response to Intervenor Sarvey's Reply to Applicant's motion (Sarvey Reply). CCSF very much regrets the need to file this reply and deplores the ongoing procedural issues that come to characterize this proceeding. However, the Sarvey Reply continues Intervenor Sarvey's attempts to introduce additional evidence after the close of evidentiary hearings contrary to the Commission's rules. While the City strongly disagrees with all aspects of Intervenor Sarvey's response to its motion, the City acknowledges Mr. Sarvey's right to respond and will limit its own response to addressing the portions of the Sarvey Response that improperly attempt to introduce additional evidence.

Frequently, Mr. Sarvey attempts to justify his use of materials that are not in evidence by asking the Commission to take administrative notice of them. Because they are not justified, these requests should be denied.

I. The Commission Should Not Allow Mr. Sarvey to Use Principles of Official Notice<sup>1</sup> to Indefinitely Extend the Hearing Process.

The Sarvey Reply and prior Sarvey pleadings attempt to introduce into the record additional material, after the close of evidentiary hearings, by the mere artifice of

<sup>1</sup> Mr. Sarvey uses the term administrative notice but cites to the Commission rule 1213 which relates to official notice.

requesting the Commission to take administrative notice of the materials. In the Sarvey Reply, Mr. Sarvey selectively quotes the Commission's rule on official notice for the proposition that "the commission may take official notice of any generally accepted matter within the commission's field of competence . . . ." Sarvey Reply at 3.

Rule 1213 does not, however, provide for an ongoing and unrestricted expansion of the evidentiary record, as Mr. Sarvey's analysis implies. Rule 1213 provides that "[p]arties to the proceeding shall be informed of the matters to be noticed, and those matters shall be noted in the record or attached thereto. Any party shall be given a reasonable opportunity on request to refute officially noticed matters by evidence or by written or oral presentation of authority." Thus, in order for the Commission to take official notice of a matter, there are specific procedures to be followed. Moreover, there is nothing in Rule 1213 to suggest that the purpose of official notice is to allow parties to indefinitely extend creation of an evidentiary record.

As to some of the matters set forth in Mr. Sarvey's Opening Brief, Reply Brief, Reply to Staff's Brief, and Sarvey Reply, that are not in evidence, Mr. Sarvey simply references the materials without further ado. With regards to these materials there is no justification whatsoever to allow them to become part of the evidentiary record in this case. Rule 1213 provides that parties must be given notice and an opportunity to respond before official notice is given to a matter. Since Mr. Sarvey failed to request that official notice be given to these matters, they should simply be deemed public comment.

As to some matters set forth in Mr. Sarvey's Opening Brief, Reply Brief, Reply to Staff's Brief, and Sarvey Reply, that are not in evidence, Mr. Sarvey perfunctorily asks the Commission to take administrative notice of them with no discussion of why such

administrative notice is appropriate. The City objects to these requests for all materials that were available at the time of the evidentiary hearings because Mr. Sarvey could have either introduced them at the hearing or asked the Commission to take official notice of them at that time. Hence the City would have had the opportunity to respond (to which it is entitled under Rule 1213) during the evidentiary hearings, without an endless stream of attempts to introduce new materials.

There was only one matter in the items that the City called out in its August 3, 2006 motion to have portions of Mr. Sarvey's reply briefs deemed public comment that does not fall into one of the two categories listed above, the use of information about ozone violations during this summer. As to that item, the City argued in its motion that it is irrelevant because the City is fully mitigating its ozone precursor emissions. If the Commission rejects this assessment, then the City's further references to the same document used by Mr. Sarvey which showed that none of the violations have taken place in San Francisco should be treated as the City's opportunity to respond, to which it is entitled under Rule 1213.

The City recognizes that in its Reply Brief, it asked the Commission to take administrative notice of additional sections of items referenced by Mr. Sarvey that were not part of the evidentiary record. The City could have instead at that time argued that the inappropriate references should have been treated as public comment because they were not in the record. It chose, however, to rely on its Rule 1213 right to respond.

With regards to the continuing extra record references in Mr. Sarvey's Reply Brief, Reply to Staff and the recent Sarvey Reply, the City considers that the appropriate response is to deny any request to have further materials admitted through use of official

notice. Except in the case of new information that is truly significant for the purpose of a reasoned decision, it is reasonable to end attempts to introduce additional evidence at the close of evidentiary hearings.

The next section documents the portions of the Sarvey Reply that include new information that is not in the record. All the materials in the Sarvey Reply were available at the time of the evidentiary hearings, and thus, the City avers that Mr. Sarvey's attempts to introduce them into the record at this late stage through the use of administrative notice is inappropriate. In the event that the Committee disagrees with this assessment, the City respectfully reserves its right to provide a substantive response in accordance with Rule 1213.

II. All the extra-record materials that Mr. Sarvey includes in his Reply were in existence at the time of the evidentiary hearings.

Sarvey Reply, page 7. The only document that was marked for identification on May 31, 2006 was the Electricity Resource Plan itself. No attachments or related analyses were identified. 5/31/2006 RT at 159-61. The further quotation from the Rocky Mountain Institute analysis in the Sarvey Reply is inappropriate. The analysis was in existence at the time of the evidentiary hearings.

Sarvey Reply, page 9. The further paraphrases of Ms. Fox's prefiled testimony in the Potrero 7 proceeding that are set forth in Sarvey Reply are inappropriate.

Sarvey Reply, pages 11-12. The further references to the record in the Los Esteros project are outside the record and inappropriate. In addition, Mr. Sarvey references yet another ARB document that is dated May 2005. This document was available at the time of the evidentiary hearings.

Sarvey Reply, page 13. The Sarvey Reply contains cites to a March 2006 ARB report that is not in evidence and that could have been, but was not, introduced into the evidentiary record as it existed at the time of the proceeding.

Sarvey Reply, page 14. . The further references to the record in the Los Esteros project are outside the record and inappropriate.

III. Conclusion.

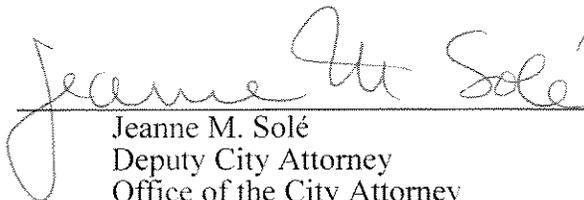
Mr. Sarvey's ongoing attempts to indefinitely add to the evidentiary record in this case with no justification should be denied.

Dated: August 28, 2006

Respectfully submitted:

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**ELECTRONIC PROOF OF SERVICE LIST  
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SAN FRANCISCO ELECTRIC RELIABILITY PROJECT  
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DOCKET NO. 04-AFC-1

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