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BEFORE THE
STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Application for Certification For the San Francisco Electric Reliability Project	Docket No. 04-AFC-1

PETITION TO THE FULL COMMISSION
TO REVIEW THE
"RULING RE CARE'S REQUEST FOR RECONSIDERATION"

CARE asks the full Commission to review the ruling entitled: "RULING RE CARE'S REQUEST FOR RECONSIDERATION" dated July 6, 2006. The issue is the denial of admission into evidence of a transcript from a California Public Utilities Commission (CPUC) proceeding addressing CARE's goal of closing power plants in a residential neighborhood in the City and County of San Francisco (CCSF). This ruling was contrary to the case law and accepted practices for the use of prior testimony in administrative proceedings involving the same parties and the same issues.

WHY DID CARE INTERVENE IN THIS PROCEEDING?

CARE represents the residents of the neighborhood at the proposed power plant site. The area has been used for over fifty years for electric power generation by Pacific Gas and Electric Company (PG&E). The area's residents who are predominantly of African American or Samoan descent were exposed to power plant emissions during this period. Community groups often complained about the pollutant emissions in their neighborhood and were rewarded with PG&E's announcement of closing the power plants if an alternate source of power could be found. This alternative source was identified as the Jefferson-Martin Transmission 230 kV Transmission Project proposed in CPUC proceeding A.02-09-043.

An issue concerning this project was the opposition of the community groups representing residents living in the area of the transmission line. CARE was asked to

intervene in the A.02-09-043 proceeding to present other community groups interested in removing power plant emissions from their neighborhood. CARE did intervene and made significant contributions to the successful siting of the transmission line[1] and the ultimate closure of PG&E's Bay View Hunters Point power plant.

The residents didn't have long to celebrate however, because the CCSF filed the Application For Certification (AFC) on March 18, 2004 under Docket 04-AFC-1, for the San Francisco Energy Reliability Project (SFERP). CARE petitioned to intervene[2] in the proceeding because their goal of eliminating power plant emissions in their neighborhood was threatened by the new project.

CARE had the same goals and interests for its participation in both the CPUC A.02-09-043 proceeding as it has for its participation in the CEC 04-AFC-1 proceeding. The parties in the A.02-09-043 proceeding knew CARE's interests and goals because CARE was invited to participate in the proceeding to represent those interests and goals. CCSF, the applicant in the CEC, 04-AFC-1 proceeding, also was a party to the A.02-09-043 proceeding and therefore was aware of CARE's interests and goals.

DISCUSSION

The California Evidence Code sections 1290, 1291, and 1292 state the conditions for making prior testimony admissible as evidence a hearsay exception to the rule excluding hearsay as evidence in a California civil proceeding[3].

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[1] CPUC Decision (D.)06-04-018

[2] CARE's Petition to Intervene with Financial Hardship was granted on July 9, 2004.

[3] CALIFORNIA LAW REVISION COMMISS ION, STAFF MEMORANDUM, August 31, 2004, Memorandum 2004-45, page 3:
"Evidence Code Section 1291 governs the use of former testimony that is offered against a party who previously proffered the evidence, or the successor in interest of such a party. The provision also governs the use of former testimony that is offered against a party who had the right, opportunity, and similar motive to cross-examine the declarant in the prior case:
1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

The July 6, 2006, ruling mistakenly states that there were different subjects for the hearings at the two agencies and that therefore the CCSF, the Applicant, lacked the same interest and motive to cross examine the PG&E witness. The California Evidence Code clearly finds that the subjects for the hearings don't matter because that subject is not addressed by the Code or by treatises discussing the Code. Each agency has a different mandate and therefore usually does not describe its subject the same way, but the California Evidence Code does recognize that if the party objecting to the evidence and the party offering the evidence were both parties to the two proceedings, that there are circumstances under which the evidence is admissible.

The California Evidence Code does not allow a party to administrative proceedings to make inconsistent representations just to prevail. In this present situation, the CCSF is trying to do just that. It represented itself as a champion of the CCSF residents in asking for the approval of the Jefferson-Martin Transmission 230 kV Transmission Project and then decided to take over the site and build its own power plant without regard to the interests of the residents. CARE is maintaining its goals and interests and needs to introduce Applicant's differing representations in order to protect the residents of the area from the damaging power plant emissions.

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(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

(1) Objections to the form of the question which were not made at the time the former testimony was given.

(2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

In determining whether a party had a similar motive to cross-examine the declarant in the prior case, a court should examine practical considerations and not merely the similarity of the party's position in the two cases. . .."

Page 4: "Section 1290 defines "former testimony" to include testimony given in an administrative adjudication or arbitration proceeding."

The July 6, 2006, ruling also mistakenly argues that the prior testimony is "internally inconsistent and therefore not material or probative" thereby allowing denial of its admission into evidence. The fact that the administrative law judges for the CPUC proceeding allowed the testimony to become part of the record should be controlling. The presiding commissioners overseeing the 04-AFC-1 siting case weren't present at the CPUC A.02-09-043 proceeding, but Applicant and CARE were. Neither Applicant nor CARE moved to strike the testimony and therefore accepted it as it was presented. Applicant did not object to the testimony, Applicant did not question the witness further although it was Applicant's right to do so.

And, therefore, Applicant and CARE accepted the testimony as material, probative, consistent evidence.

The July 6, 2006, ruling wrongly considers the transcript in question as the entire proceedings and all the evidence of the CPUC proceeding A.02-09-043, but it is not. There were other witnesses, there were reports and data requests, there were meetings and field trips, and Applicant and CARE agreed during the A.02-09-043 proceeding that in the context of the entire case that the transcript recording the testimony of PG&E's Mr. Yeung was material, relevant, and consistent with the other evidence accepted as the record for the case.

CONCLUSION

CARE asks the Commission to reverse the July 6, 2006, ruling denying CARE's introduction of the transcript of PG&E's Mr. Yeung into the record as evidence in this case. This evidence is material to CARE's case. It is a denial of due process and the equal protection of law to allow Applicant to present its case and denying CARE to make a presentation. CARE represents the residents who will have to live next to the proposed power plant while the energy commission staff and the representatives of the CCSF do not.

Respectfully submitted,

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Verification

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed on this 10th day of July 2006, at Soquel, California.

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