

CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:) Docket No. 04-AFC-1
Application for Certification)
of San Francisco Electric)
Reliability Project) REPLY BRIEF

**CA ISO has violated a statutory mandate for review of the RWQCB
activity in the CA ISO's November 11, 2003 approval**

As CARE stated in its June 26, 2006 Opening Brief CA ISO reviewed applicant's proposed new generation project in accordance with Amendment 39 of the CA ISO tariff, but did not consult and coordinate with the San Francisco Bay Regional Water Quality Control Board (RWQCB).

The CA ISO determination was posted at the CEC website on April 14, 2006, as "Testimony of Lawrence Tobias from CA ISO." The witness described the CA ISO review process on lines 1 through 9 of page 2 of that exhibit. This description included a citation to the CA ISO tariff but did not address the CA ISO's compliance with applicable California laws.

The full name of the corporation is "California Independent System Operator Corporation." This corporation is a nonprofit public benefit corporation. It is organized under the Nonprofit Public Benefit Corporation Law for the charitable purposes set forth in Chapter 2.3, Part 1, Division 1 of the Public Utilities Code of the State of California.

The California Public Utilities Code sections 345 through 352.7 are the applicable state law. Section 345.51 specifically states the necessary steps for the

¹ 345.5. (a) The Independent System Operator, as a nonprofit, public benefit corporation, shall conduct its operations consistent with applicable state and federal laws and consistent with the interests of the people of the state.

(b) To ensure the reliability of electric service and the health and safety of the public, the Independent System Operator shall manage

1 CA ISO to conduct its operations. The CA ISO must
2 consult and coordinate with appropriate state and
3 local agencies to ensure that it operates in
4 furtherance of state law regarding consumer and
5 environmental protection.

6 The CA ISO testimony in this proceeding shows
7 that it reviewed applicant's proposed new generation
8 project in accordance with Amendment 39 of the CA ISO
9 tariff, but did not consult and coordinate with the
10 San Francisco Bay Regional Water Quality Control Board
11 (RWQCB). In fact, the CA ISO approved applicant's
12 project on November 11, 2003, months before the AFC
13 was submitted to the California Energy Commission and
14 before the project was proposed at the current site.

15 Testimony by the RWQCB on May 31, 2006, [See Tr.
16 Pages 11 and 12.] demonstrates that although the Board
17 was named "administering agency" pursuant to the
18 California Health and Safety Code in 1999, it did not
19 begin reviewing the area as a site for a power plant
20 until January 2006. Therefore, it is clear that the
21 CA ISO issued its November 11, 2003, approval of

22 the transmission grid and related energy markets in a manner that is
23 consistent with all of the following:

24 (1) Making the most efficient use of available energy resources.
25 For purposes of this section, "available energy resources" include
26 energy, capacity, ancillary services, and demand bid into markets
27 administered by the Independent System Operator. "Available energy
28 resources" do not include a schedule submitted to the Independent
29 System Operator by an electrical corporation or a local publicly owned
30 electric utility to meet its own customer load.

31 (2) Reducing, to the extent possible, overall economic cost to the
32 state's consumers.

33 (3) Applicable state law intended to protect the public's health
34 and the environment.

35 (4) Maximizing availability of existing electric generation
36 resources necessary to meet the needs of the state's electricity
37 consumers.

38 (c) The Independent System Operator shall do all of the following:

39 (1) Consult and coordinate with appropriate state and local
40 agencies to ensure that the Independent System Operator operates in
41 furtherance of state law regarding consumer and environmental
42 protection.

43 (2) Ensure that the purposes and functions of the Independent
44 System Operator are consistent with the purposes and functions of
45 nonprofit, public benefit corporations in the state, including duties
46 of care and conflict-of-interest standards for officers and directors
47 of a corporation. . . . [sections (c)(3) and (c)(4) omitted]

1 applicant's project without complying with applicable
2 state law. The CA ISO can not reach a decision about
3 the proposed project until after the RWQCB reviews the
4 site as a site including the proposed power plant and
5 consults with the CA ISO as provided for by CPU code
6 section 345.5.

7 Sammis v. Stafford (1996) 48 Cal.App.4th 1935,
8 56 Cal.Rptr.2d 589[No. D020439. Fourth Dist., Div.
9 One. Sep 10, 1996.]describes the basic California law
10 in this instance.

11 " ' [U]ltra vires' refers to an act which is
12 beyond the powers conferred upon a
13 corporation by its charter or by the laws of
14 the state of incorporation" (Marsili v.
15 Pacific Gas & Elec. Co. (1975) 51 Cal.App.3d
16 313, 322 [124 Cal.Rptr. 313, 79 A.L.R.3d
17 477].)"

18 It is clear that the CA ISO has violated a
19 statutory mandate for their activity and the CA ISO's
20 November 11, 2003, approval was ultra vires of its
21 statutory mandate. The CA ISO cannot approve of the
22 SFERP until after it has complied with its statutory
23 mandate.

24 The CEC regulations section 1744(b), California
25 Code of Regulations, Title 20, states that:

26 "(b) Upon acceptance of the application,
27 each agency responsible for enforcing the
28 applicable mandate shall assess the adequacy
of the applicant's proposed compliance
measures to determine whether the facility
will comply with the mandate. The commission
staff shall assist and coordinate the
assessment of the conditions of
certification to ensure that all aspects of
the facility's compliance with applicable
laws are considered."

29 The CEC signed a memorandum of understanding with
30 the RWQCB on June 5, 2006, and has not provided any
31 similar memorandum signed by the CA ISO and the RWQCB.
32 Therefore, the CEC cannot approve this application for
33 certification, 04-AFC-01.
34 [CARE June 26, 2006 Opening Brief at pages 4 to 6.]

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2 No Parties' Opening Testimony has provided any
3 information to refute CARE's claim. This is also a due process
4 and equal protection violation which has continued unabated as
5 evidenced by recent events that transpired with the RWQCB since
6 after the June 26, 2006 due date for Opening Briefs. On June 26,
7 2006 the Applicant filed its "Supplemental Investigation Work
8 Plan" for the SFERP with the CEC and RWQCB. June 27, 2006 the
9 RWQCB filed its "Approval of Supplemental Investigation Work
10 Plan for the 4 acre SFERP near 25th and Louisiana Streets".
11 These actions by the Applicant and RWQCB provide evidence of
12 CARE's contention that this process fails to meet the
13 requirements for meaningful and informed public participation
14 under the California Environmental Quality Act (CEQA), the
15 Warren-Alquist or other applicable state or local LORS. The
16 mandate of public participation requires members of the public
17 and parties in Commission proceedings to have access to
18 documents and information they need to participate meaningfully.
19 In order for there to be both meaningful and informed public
20 participation, as required by statutes like the Warren-Alquist
21 Act, and CEQA, it is required that public participation be both
22 well informed (e.g., based on full and fair disclosure of all
23 relevant material), and meaningful or effective (i.e., a full,
24 fair and constitutionally adequate opportunity to influence the
25 decision makers and otherwise participate in the overall
26 environmental review, ratemaking, or rulemaking and concurrent
27 democratic decision making processes). Staff's Opening Testimony
28 fails to refute this claim.

Under California law, public participation violations are generally treated as presumptive, prejudicial abuses of

1 discretion² requiring the setting aside of project approvals or
2 the invalidation of other actions taken by public agencies. The
3 MOU doesn't seem to understand, and certainly doesn't adequately
4 analyze and implement these vital legal points, and the
5 constitutional as well as social-political values they embody
6 and seek to protect and promote. Staff's Opening Testimony fails
7 to refute this claim.

8 CARE contends that it is improper for the Applicant to
9 defer its Proposed Remedial actions to clean up the site until
10 after the permit is issued for the project by the CEC. To do so
11 violates the city's own ordinances, and the California
12 Environmental Quality Act (CEQA) which requires all feasible
13 mitigation be adopted or that the project be denied for inducing
14 significant unmitigated adverse impacts on the environment. CEQA
15 is primarily a public disclosure statutory scheme allowing the
16 affected community to be informed and members of the public to
17 voice their opinion, and to have input, about projects that may
18 affect their environment. CEQA requires a review of the
19 environmental impacts of overall activities ("the whole of an
20 action" - 14 Cal. Code Regs. § 15378(a)) defined as "projects."
21 (Pub. Res. Code § 21065.) This strong, broad right of public
22 participation under CEQA has a political component (i.e., CEQA
23 allows the compilation of a record concerning the approval of
24 development projects that can be used by the public to vote
25 environmentally insensitive decision makers out of office come
26 election day), the violation or deprivation of which has
27 constitutional ramifications on an affected community as well as

28 ² In other words, a violation that deprives the public or the
decision makers of relevant information about a project or
administrative action being taken by a public agency creates a legal
presumption that the omission of that information causes prejudice to
the public constituting an abuse of discretion by the agency.

1 the public at large. Staff's and Applicant's Opening Testimony
2 fails to refute this claim.

3 Additionally, in deferring the mitigation plan until after
4 the project is approved the CEC as the lead agency under CEQA is
5 "piecemealing" the overall activity. CEQA strongly forbids this
6 kind of "chopping up [of] a proposed project into bite-size
7 pieces which, individually considered, might be found to have no
8 significance on the environment." (Kings County Farm Bureau v.
9 City of Hanford (1990) 221 Cal.App.3d 692, 716, citing Orinda
10 Assn. v. Board of Supervisors (1986) 182 Cal.App.3d 1145, 1171,
11 1172; see also Bozung v. LAFCO (1975) 13 Cal.3d at 283-284;
12 Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296,
13 309.) Staff's and Applicant's Opening Testimony fails to refute
14 this claim.

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16 **Staff's Opening Brief fails to refute claim that CA ISO has**
17 **violated a statutory mandate for the RWQCB activity in the CA**
18 **ISO's November 11, 2003 approval**

19 CARE and Sarvey took issue with the above approach and
20 the conditions that would implement it. They raised no
21 issue with the Staff's proposed performance standards,
22 no issue with the "menu" of various remediation
23 measures that Staff described and the Regional Board
24 staff confirmed, no issue with the Staff-proposed (and
25 City-agreed to) conditions regarding the various
26 documents, assessments, and analyses, and no issue
27 with regard to the site sampling plan (also called the
28 site characterization study) that the two agency
staffs approved and the City carried out. Rather, they
questioned why they shouldn't receive the HRA, ERA,
and SCP during the Commission's siting process, so
that they could comment on these documents during this
proceeding. (See, e.g., May 22 RT 91-92.)

The answer is that the documents feed into the
Regional Board's "administering agency" role, and its
authority to release the SCP—the document that

1 determines site remediation requirements and
2 procedure. When the HRA and ERA are finished they will
3 be publicly available documents that CARE and Sarvey
4 can comment on to the Regional Board before it
5 approves the SCP. Even if the documents were available
6 today, the comments would logically be directed to the
7 Regional Board, as it is the agency with authority to
8 set the requirements for site cleanup. The Regional
9 Board's Mr. Hill described his agency's public
10 process, and assured intervenors and the Commission
11 that there will be ample opportunity for public
12 comment on the HRA, ERA, and draft SCP. (See May 31 RT
13 9-12.)

14 To fulfill its CEQA role for disclosure of impact,
15 Staff has proposed conditions that require the full
16 panoply of documents the Regional Board will use.
17 Staff has also urged execution of the site
18 characterization study (site sampling plan) that
19 included the specific site assessment for pollution.
20 Based on this site characterization Staff testified
21 concerning 1) the nature of the contamination on the
22 site (Exh. 49, pp.2-3; May 22 RT 111-116), 2) the
23 kinds of remediation ("menu" of measures) that could
24 be required by the Regional Board to remediate the
25 site, if such is determined to be necessary (Exh. 49,
26 pp. 4-5; May 22 RT 106-107), 3) the dust control
27 measures that will accompany site construction (Exh.
28 49, p. 4; May 22 RT 102-103), and 4) the performance-
based health standards that are appropriate and
feasible. (Exh. 49, pp. 4-6; May 22 RT 102-105.)

To further assure that Regional Board SCP requirements
are consistent with the Staff's performance standards,
Staff has entered into the staff-to-staff MOU that
allows it to collaborate with the Regional Board staff
to assure the performance standards are properly
observed. Staff testified that these conditions will
prevent any significant impact to public health and
worker safety. (Exh. 49, p. 5; May 22 RT 107, 116.)
[Staff Opening Brief at pages 33 to 34]

As we stated in our Opening Brief, Testimony by the RWQCB on May
31, 2006, [See Tr. Pages 11 and 12.] demonstrates that although
the Board was named "administering agency" pursuant to the

1 California Health and Safety Code in 1999, it did not begin
2 reviewing the area as a site for a power plant until January
3 2006. Therefore, based on the foregoing and recent events with
4 the RWQCB, it is clear that the CA ISO issued its November 11,
5 2003, approval of applicant's project without complying with
6 applicable state law, and Staff's Opening Brief fails to refute
7 this contention. The CA ISO can not reach a decision about the
8 proposed project until after the RWQCB reviews the site as a
9 site including the proposed power plant and consults with the CA
10 ISO as provided for by CPU code section 345.5. Staff's and
11 Applicant's Opening Testimony fails to refute this claim.

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15 **Applicant's Opening Brief fails to refute claim of CARE's expert**
16 **testimony of Martin Homec that "that generation in the City and**
17 **County of San Francisco will not be necessary after the**
18 **Jefferson-Martin 230 kV Transmission Project is complete."**

19 Applicant's Opening Testimony failed to refute CARE's
20 expert testimony of Martin Homec that "that generation in the
21 City and County of San Francisco will not be necessary after the
22 Jefferson-Martin 230 kV Transmission Project is complete."

23 CARE submitted testimony by Mr. Homec which claimed
24 that generation in the City will not be necessary
25 after the Jefferson-Martin 230 kV Transmission Project
26 is complete. Exh. 97. Mr. Homec admitted that he has
27 no training or expertise in transmission planning:
28 "I'm not an expert in transmission line planning."
5/31/06 RT (Homec) at 259-60. Mr. Homec's testimony
thus relies solely on testimony by a Pacific Gas and
Electric Company (PG&E) witness, Mr. Yeung, in the
Jefferson-Martin transmission line case. Exh. 97.

1 Mr. Homec characterizes Mr. Yeung's testimony to state
2 "that generation in the City and County of San
3 Francisco will not be necessary after the Jefferson-
4 Martin 230 kV Transmission Project is complete." Exh.
5 97 at 1. However, the Yeung testimony that Mr. Homec
6 relies upon is not clear as to whether, in stating
7 that reliability could be met with the Jefferson-
8 Martin transmission line alone, Mr. Yeung assumed the
9 Potrero Power Plant was in service. See Exh. 59 at
10 467-471. Mr. Homec cites to pages 468-469 of the
11 transcript. On pages 471-72, however, there is a
12 discussion of the fate of Hunters Point Power Plant in
13 the event that the Jefferson-Martin transmission is
14 not built. Exh. 59 at 471-472. Mr. Yeung testified
15 that if the Jefferson-Martin line were not built, the
16 CAISO might not allow PG&E to close down Hunters Point
17 Power Plant. Exh. 59 at 471. There is no discussion of
18 closing down Potrero Power Plant, however, which
19 suggests that Mr. Yeung was assuming the Potrero Power
20 Plant would still be operating.

21 In any event, the transcript makes it clear that Mr.
22 Yeung's testimony, such as it is, relates to the year
23 2006, Exh. 59 at 469: 1-5, whereas the SFERP is now
24 projected to be in service in 2008. 4/27/06 RT (Flynn)
25 at 30:1-4.

26 [Applicant's Opening Brief at page 15 to 16.]

27 Further, the Applicant's Opening Testimony failed to provide any
28 evidence in the record that the SFERP will result in any way in
"closing down Potrero Power Plant" and the record clearly
demonstrates that at this time any such claim by the Applicant
would be speculative at best. Staff's and Applicant's Opening
Testimony fails to refute this claim.

No Demonstrated Need

There is no demonstrated need for the SFERP. And, there
is sufficient evidence for the CEC to base a finding on the
evidence developed in this proceeding that the project is not
needed. CARE witness Martin Homec's testimony on May 31, 2006,

1 shows that in California Public Utilities Commission (CPUC)
2 proceeding Application (A.)02-09-043, Pacific Gas and Electric
3 Company's witness stated that the SFERP would not be necessary
4 once a new transmission line project was completed. The CPUC
5 proceeding testimony was referred to by Homec's testimony and
6 was offered as evidence during the proceeding by both CARE's
7 Michael Boyd and CARE's witness Martin Homec. This matter is
8 currently on Appeal to the Full Commission.
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11 **CONCLUSION**

12 CARE therefore asks that the Commission deny applicant's
13 application for certification of the SFERP. Applicant's project
14 was not subjected to the due process of existing laws applicable
15 to the review and siting of the proposed SFERP. Applicant's
16 Anne Eng stated that the proposed site is within an
17 "environmental justice" area inhabited by a disproportionately
18 large number of minorities for the CCSF. Approving the
19 application is a thus a violation of the community's
20 constitutional right to equal protection of the law.
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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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