

**Public Advisor's Office - Reply of CARE -- Re: SFERP, Docket Number 04-AFC-01, Revised Testimony and Resume of Martin Homec, and January 12, 2004 CPUC hearing transcript on PG&E Application for 230KV Jefferson Martin transmission line (for identification only)**

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**From:** Michael Boyd <michaelboyd@sbcglobal.net>  
**To:** Jeanne Sole <Jeanne.Sole@sfgov.org>, <gfay@energy.state.ca.us>  
**Date:** 6/11/2006 11:52 PM  
**Subject:** Reply of CARE -- Re: SFERP, Docket Number 04-AFC-01, Revised Testimony and Resume of Martin Homec, and January 12, 2004 CPUC hearing transcript on PG&E Application for 230KV Jefferson Martin transmission line (for identification only)  
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<b>DOCKET</b>
<b>04-AFC-1</b>

DATE	Jun 12 2006
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Reply of CARE to Applicant's offer of additional thoughts,

1) The time for Mr. Boyd to debate the introduction of evidence was at the hearing. He made the same argument then and did not prevail. Parties should be able to devote their energies to preparing a brief rather than rearguing the myriad of rulings made during the hearings. I note that I believe it was over my objection that Mr. Boyd was allowed to have his witness testify about his understanding of the former testimony in question. Thus, Mr. Boyd had the opportunity to introduce his witnesses' understanding of the substance of the testimony in any event.

CARE is not represented by legal counsel in this proceeding therefore it shouldn't be expected to know laws of evidence as Ms. Sole should be expected to know as an attorney. Why was

CCSF given an opportunity to redirect its air quality witness at the May 31 hearing when Ms. Sol refused redirect on May 22? There is clearly a double standard for the Applicant's benefit when the City is allowed to redirect its air quality witness, while we are denied an opportunity to review the evidentiary codes of evidence which clearly allows the January 12, 2004 transcript in the 230KV Jefferson Martin transmission project to be admitted in to evidence. This double standard in the treatment of CARE and its witnesses provides CARE the evidence of retaliation for bringing a complaint of discrimination based on race and income against the Applicant and CEC before the US DOE and US DOJ.

8 HEARING OFFICER FAY: Any redirect, Ms.

9 Solâ€š?

10 MS. SOL\_: No.

RT 5-22-2006 P. 292

21 Okay. Do you want to go ahead then and  
22 bring up your air quality witnesses for redirect?

23 MS. SOL\_: Yes, Your Honor.

24 MR. SARVEY: I'm going to have to

25 object, Mr. Fay.

RT 5-31-2006 P. 26

2) As Mr. Ratcliff's cross examination of Mr. Homec showed, the transcript is ambiguous as to the fact Mr. Homec was seeking to establish. Problems like these provide support for the rule that prior testimony should not be admitted unless a witness is truly unavailable. Parties did not have the opportunity to clarify with Mr. Manho what he meant. I note that the City did not have the same interest in the Jefferson-Martin proceeding to get clarity on the need for the turbines or not. The main interest of the City in that case was to support the need for Jefferson-Martin not the turbines -- which were not at issue in that proceeding.

CARE requested the PG&E witness be made available by subpoena. It was within the Committee's discretionary authority to deny the request and therefore the witness's unavailability is clearly not due to CARE's failure to request the witness be available. See 4 below regarding the Jefferson Martin project.

3) The opinion of one PG&E planning engineer as to the need for the City's turbines will not determine whether the RMR for Potrero will be maintained or not after the City's turbines are in place. That question will be determined by the ISO. An ISO witness was present at the hearing and testified as to that question. Thus, the testimony Mr. Boyd seeks to introduce is largely irrelevant.

This is ludicrous. Since PG&E will procure this electricity from the Applicant for its ratepayers under a DWR contract PG&E's planning engineer is the best qualified expert whether the RMR for Potrero will be maintained or not after the City's turbines are in place. Additionally Mirant is best qualified to determine whether or not the RMR for Potrero will be maintained, not the CAISO or Applicant's witnesses.

4) It continues to be unclear what portion of the transcript Mr. Boyd seeks to introduce. First he attached the entire transcript for January 12, 2004; then he provided pages 460-471; now he is once more attaching the entire transcript. Parties needed to have notice of what sections of the transcript Mr. Boyd sought to use. Certainly, use of anything more than pages 460-471 would be highly inappropriate.

CARE wants the entire transcript admitted, and briefs on any portion of this transcript to be allowed. During the May 31, 2006 evidentiary hearing Applicant's witness Barry Flynn stated the Applicant supported the Jefferson Martin transmission project.

15 HEARING OFFICER FAY: It's not an  
 16 opportunity to ask this witness what another  
 17 witness said in another hearing.  
 18 MR. BOYD: Okay, I understand.  
 19 HEARING OFFICER FAY: Okay? So.  
 20 MR. BOYD: I understand.  
 21 Could you state what the purpose of your  
 22 testimony was in that proceeding? If it had  
 23 anything to do, or if you mentioned the San  
 24 Francisco Electric Reliability project as part of  
 25 your testimony? And the need for it.  
 1 MR. FLYNN: It was some time ago that I

2 prepared and gave my testimony. The general tenor  
 3 of my testimony was to support the project because  
 4 the project was one of a group of eight projects  
 5 made in conjunction with the San Francisco  
 6 Electric Reliability project, would allow the City  
 7 to achieve its goals, which is to shut down  
 8 existing generation.

9 So I remember that as being the reason  
 10 the City was involved, and why I was involved in  
 11 testifying, was generally to support the  
 12 Jefferson-Martin project.

13 But that's about as much as I can even  
 14 recall about it.

[May 31 RT at pages 229 to 230.]

CARE disputes this representation of the Applicant's position in the Jefferson Martin transmission project alleging instead that Applicant sought the delay of the project and the ultimate shut down of PG&E's Hunters Point power plant, which we allege was based on the Applicant's discriminatory policy of seeking approval of the SFERP by the CEC prior to construction of the Jefferson Martin line. CARE offers the Applicant should be given an opportunity to prove CARE allegations are erroneous by submitting a copy of the Jefferson Martin transcript that includes the testimony of Mr. Barry Flynn to prove otherwise.

Mike Boyd-CARE

----- Original Message -----

From: Jeanne Sole <Jeanne.Sole@sfgov.org>

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Sent: Tuesday, June 6, 2006 10:56:45 AM

Subject: Re: SFERP, Docket Number 04-AFC-01, Revised Testimony and Resume of Martin Homec, and January 12, 2004 CPUC hearing transcript on PG&E Application for 230KV Jefferson Martin transmission line (for identification only)

Mr. Fay:

I would offer the following additional thoughts in response to Mr. Boyd's request.

1) The time for Mr. Boyd to debate the introduction of evidence was at the hearing. He made the same argument then and did not prevail. Parties should

be able to devote their energies to preparing a brief rather than rearguing the myriad of rulings made during the hearings. I note that I believe it was over my objection that Mr. Boyd was allowed to have his witness testify about his understanding of the former testimony in question. Thus, Mr. Boyd had the opportunity to introduce his witnesses' understanding of the substance of the testimony in any event.

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06/05/2006 10:20 PM

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Re: SFERP, Docket Number 04-AFC-01, Revised  
 Testimony and Resume of Martin Homec, and  
 Subject January 12, 2004 CPUC hearing transcript on  
 PG&E Application for 230KV Jefferson Martin  
 transmission line (for identification only)

Gary,

The reference to Professor Jack Friedenthal comes from  
 page 5 of the CALIFORNIA LAW REVISION COMMISSION STAFF  
 MEMORANDUM, Study K-201, August 31, 2004, Memorandum  
 2004-45, Conforming the Evidence Code to the Federal  
 Rules of Evidence:Hearsay Issues.

Mike Boyd-CARE

--- Michael Boyd <michaelboyd@sbcglobal.net> wrote:

> Dear Gary Fay,

>  
> At the May 31, 2006 Evidentiary Hearing on the  
> SFERP  
> I tried to introduce the January 12, 2004 transcript  
> from the PG&E 230KV Jefferson Martin transmission  
> line  
> project before the CPUC which included the testimony  
> of Manho Yeung of PG&E along with the Testimony of  
> Martin Homec on the SF Airport alternative and you  
> said you would only admit this transcript for  
> identification only.  
>  
> I wish to request your reconsideration and  
> clarification on why this January 12, 2004  
> transcript  
> from the PG&E 230KV Jefferson Martin transmission  
> line  
> project before the CPUC can not be accepted as  
> evidence in the form of Testimony from Manho Yeung  
> of  
> PG&E? I used statements made by PG&E witness Yeung  
> in  
> Martin Homec's testimony. Applicant said that it  
> was  
> hearsay and that it could not be used in the CEC  
> proceeding at the April 27, 2006 Evidentiary Hearing  
> because the witness Manho Yeung was unavailable.  
>  
> [April 27, 2006 RT at Page 7 to 8]  
>  
> 25 MS. SOL\_: Okay. I did have an  
> 1 objection to the introduction to the attachment to  
>  
> 2 his testimony, which was the transcript of the  
> 3 Jefferson-Martin proceedings. Is this the  
> 4 appropriate time to deal with that objection?  
> 5 HEARING OFFICER FAY: Sure, why don't  
> 6 you make your objection and state your reasons for  
>  
> 7 it.  
> 8 MS. SOL\_: That is testimony by a  
> 9 witness who has not been brought here. The rule  
> 10 on using testimony from another proceeding is  
> that  
> 11 the witness who gave that evidence is not  
> 12 available. I'm not aware that Mr. Manho is not  
> 13 available, unavailable, is generally considered  
> to  
> 14 be out of state or deceased or severely ill.  
> 15 So I'm unaware of any effort to bring

> 16 Mr. Manho. He is not an unavailable witness, and  
> 17 therefore it's inappropriate to bring a  
> transcript  
> 18 from another proceeding into this proceeding for  
> 19 the truth of the matter.  
>  
> However, CARE did request the CEC subpoena the  
> witness  
> and the request was denied. Therefore this evidence  
> is  
> admissible as the declarant is unavailable as a  
> witness. It can not then be denied admission of the  
> testimony because the use of the testimony falls  
> within the hearsay exceptions provided for in  
> California Evidence Code sections 1290, 1291, and  
> 1292:  
>  
> "Testimony in an Administrative Adjudication or  
> Arbitration Proceeding  
> "Section 1290 defines "former testimony" to include  
> testimony given in an administrative adjudication or  
> arbitration proceeding. In contrast, Rule 804(b)(1)  
> does not specifically address testimony given in an  
> administrative adjudication or arbitration  
> proceeding.  
> "In his 1976 analysis for the Commission, Professor  
> Jack Friedenthal observed that there "seems little  
> reason not to include all former testimony, formally  
> given, regardless of the nature of the proceedings,  
> provided other safeguards are met." Friedenthal,  
> Analysis of Differences Between the Federal Rules of  
> Evidence and the California Evidence Code (Jan.  
> 1976),  
> at 62-63 (hereafter, "Friedenthal Analysis").  
> "He recommended that California keep its approach of  
> including testimony given in an administrative  
> adjudication or arbitration proceeding."  
> CALIFORNIA CODES  
> EVIDENCE CODE  
> SECTION 1290-1294  
>  
> 1290. As used in this article, "former testimony"  
> means testimony  
> given under oath in:  
> (a) Another action or in a former hearing or  
> trial  
> of the same  
> action;  
> (b) A proceeding to determine a controversy  
> conducted by or under

> the supervision of an agency that has the power to  
> determine such a  
> controversy and is an agency of the United States or  
> a  
> public entity  
> in the United States;  
> (c) A deposition taken in compliance with law in  
> another action;  
> or  
> (d) An arbitration proceeding if the evidence of  
> such former  
> testimony is a verbatim transcript thereof.  
>  
>  
> 1291. (a) Evidence of former testimony is not made  
> inadmissible by  
> the hearsay rule if the declarant is unavailable as  
> a  
> witness and:  
> (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.  
>  
> 1292. (a) Evidence of former testimony is not made  
> inadmissible by  
> the hearsay rule if:  
> (1) The declarant is unavailable as a witness;  
> (2) The former testimony is offered in a civil  
> action; and  
> (3) The issue is such that the party to the  
> action  
> or proceeding  
> in which the former testimony was given had the  
> right  
> and opportunity  
> to cross-examine the declarant with an interest and  
> motive similar  
> to that which the party against whom the testimony  
> is  
> offered 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  
> objections  
> based on competency or privilege which did not exist  
> at the time the  
> former testimony was given.  
>  
>  
>  
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