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CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

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

INTRODUCTION

Applicant submitted an application for certification (AFC) on March 18, 2004, for siting three combustion turbines on a land parcel owned by the Port of San Francisco. These turbines are part of the San Francisco Energy Reliability Project (SFERP). The project location is a 4-acre site owned by the City and County of San Francisco (CCSF) lies approximately south of 25th Street and approximately 700 feet east of Illinois Street. The new site is approximately 1/4 mile south of the Potrero site originally proposed. This site has been used for industrial purposes prior in the past.

CARE opposes this application because emissions from the project would affect occupied residential housing. The power plant should be located elsewhere or not be constructed.

Applicant states that it is needed because it is required by the California Independent System Operator (CA ISO). However, the CA ISO did not follow the procedures mandated by California Public Utilities code section 345.5 before making its determination. Furthermore, other evidence demonstrates that the power plant is not needed.

Siting the proposed project as proposed by applicant deprives local residents of their environmental justice. This

site is located on a 32 acre site proposed for other pollution emitting industrial uses. These emissions should be shared by the entire population of the CCSF. The residential neighborhoods bordering the proposed project are inhabited by a population with a far greater population of minorities than are other sections of CCSF that are located far away from the proposed site.

DISCUSSION

The land use section of the Final Staff Assessment of the San Francisco Electric Reliability Project. Posted February 21, 2006, explains that the SFERP is located in a part of San Francisco with planned combined industrial and occupied residential housing projects uses. The discussion on pages 4.5-2 and 3 explain that:

> "The generation unit would be erected on a site owned by the City/County of San Francisco (CCSF). There are no permanent structures on the site, although a temporary concrete batch plant occupies the northern portion of the project site. The area immediately east of the project site, within the proposed staging area, is currently used as a trailer storage facility for a trucking operation.
>
> "The closest residentially zoned areas occur south and west of the SFERP. The Bayview-Hunters Point neighborhood is less than one mile south of the site at its nearest point. To the west, closer residential areas occur on Potrero Hill, along Third Street, and in the small community known as Dogpatch on Third Street near 22nd Street. Dogpatch is the nearest residentially zoned area to the project (approximately 0.75 miles to the northwest)."

The public health section on page 4.7-44 contains a section describing the demographics of the area:

“Demographics of San Francisco, Bayview Hunter’s Point & Potrero Hill

“The population characteristics of the Bayview Hunter’s Point neighborhood with regards to racial/ethnic makeup, based on the results of the 2000 census, have been described by the San Francisco Planning Department in their report “Profiles of Community Planning Areas: San Francisco’s Eastern Neighborhoods” (SFPD 2002)”.

“While residents of the Bayview Hunter’s Point neighborhood of San Francisco represent 4.4% of the total population of San Francisco, 27% of the City’s African American population resides in the Bayview Hunter’s Point neighborhood. Likewise, while 7.6% of the population of San Francisco is African American, 46% of the population of Bayview Hunter’s Point is African American. . .....”

Environmental Justice

The United States Environmental Protection Agency (USEPA) provides the definition of *environmental justice* on its website:

“Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work. “

Applicant’s witness Anne Eng states on lines 11 through 22 of page 167 of the May 31, 2006, hearing transcript that the southeastern portion of the CCSF is such an environmental justice area. Applicant insists that the SFERP is necessary and must be located at the proposed site because of a CA ISO

determination. However, there is no need for the SFERP and siting it in a part of San Francisco that is a known environmental justice area is a violation of the equal protection clause of the State[1] and Federal constitutions.

CA ISO REQUIREMENTS

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.

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[1] CALIFORNIA CONSTITUTION
ARTICLE 1 DECLARATION OF RIGHTS

SEC. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution . . ..

The California Public Utilities Code sections 345 through 352.7 are the applicable state law. Section 345.52 specifically states the necessary steps for the CA ISO to conduct its operations. The CA ISO must consult and coordinate with appropriate state and local agencies to ensure that it operates in furtherance of state law regarding consumer and environmental protection.

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[2] 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 the transmission grid and related energy markets in a manner that is consistent with all of the following:

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

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

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

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

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

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

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

The CA ISO testimony in this proceeding shows that it 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). In fact, the CA ISO approved applicant’s project on November 11, 2003, months before the AFC was submitted to the California Energy Commission and before the project was proposed at the current site.

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 California Health and Safety Code in 1999, it did not begin reviewing the area as a site for a power plant until January 2006. Therefore, it is clear that the CA ISO issued its November 11, 2003, approval of applicant’s project without complying with applicable state law. The CA ISO can not reach a decision about the proposed project until after the RWQCB reviews the site as a site including the proposed power plant and consults with the CA ISO as provided for by CPU code section 345.5.

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

> “" '[U]ltra vires' refers to an act which is beyond the powers conferred upon a corporation by its charter or by the laws of the state of incorporation ...."

> (Marsili v. Pacific Gas & Elec. Co. (1975) 51 Cal.App.3d 313, 322 [124 Cal.Rptr. 313, 79 A.L.R.3d 477].)"

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

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

> "(b) Upon acceptance of the application, each agency responsible for enforcing the 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."

The CEC signed a memorandum of understanding with the RWQCB on June 5, 2006, and has not provided any similar memorandum signed by the CA ISO and the RWQCB. Therefore, the CEC cannot approve this application for certification, 04-AFC-01.

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, shows that in California Public Utilities Commission (CPUC) proceeding Application (A.)02-09-043, Pacific Gas and Electric Company's witness stated that the SFERP would not be necessary once a new transmission line project was completed. The CPUC proceeding testimony was referred to by Homec's testimony and was offered as evidence during the proceeding by both CARE's Michael Boyd and CARE's witness Martin Homec.

The testimony [May 31, 2006 Transcript pp. 249 – 268.] showed that the evidentiary hearing in the CPUC proceeding A.02-09-043, the application of Pacific Gas and Electric Company (PG&E) for a Certificate of Public Convenience and Necessity authorizing the construction of the Jefferson-Martin 230 kV Transmission Project, contained testimony by PG&E's witness stating that the SFERP is not needed.

California law on the issue of the admissibility of Homec's evidence is stated in California Evidence Code sections 240, 1290, 1291, and 1292[3]. The testimony by Manho Yeung in the

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[3] California Law Revision Commission, Memorandum 2004-45 dated August 31, 2004.
"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 EVIDENCE CODE

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

SECTIONS 1290-1292

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

CPUC proceeding, A.02-09-043, is admissible into evidence in the CEC proceeding as and exception to the hearsay rule because the CEC regulation, section 1212[4], allows the CEC to use "Hearsay

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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.

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California Code of Regulations
Title 20. Public Utilities and Energy
Division 2. State Energy Resources Conservation and Development Commission

§ 1212. Rules of Evidence.
The following rules of evidence shall apply to any adjudicatory proceeding of the commission and in such other proceedings as the commission may determine by order.
(a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant noncumulative evidence shall be admitted if it is the sort of evidence on which

evidence . . . to support a finding unless it would be admissible over objections in civil actions."

The testimony of Manho Yeung in the CPUC's A.02-09-043 proceeding is admissible over objections in civil actions because it falls within the exception to the hearsay rule provided for by the California Evidence Code sections 240, 1290, 1291, and 1292.

The statutes provide that (1) if the declarant is unavailable and (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

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responsible persons are accustomed to rely in the conduct of serious affairs.
(b) Oral or written testimony offered by any party shall be under oath.
(c) Subject to the exercise of the lawful discretion of the presiding committee member as set forth in Section 1203(c), each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence against such party. Questions of relevance shall be decided by the presiding committee member.
(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

The presiding member may establish such additional rules as necessary for the orderly conduct of the proceeding.
Note: Authority cited: Section 25218(e), Public Resources Code.
Reference: Section 25210, Public Resources Code.

and motive similar to that which the party against whom the testimony is offered has at the hearing.

Manho Yeung was unavailable according to the definition provided by California Evidence Code section 240(a) (5). CARE asked to introduce the CPUC testimony as evidence and the request was denied. CARE then requested a subpoena for the PG&E witness Manho Yeung and again was denied. The applicant objected to the CPUC proceeding testimony as hearsay and stated that CARE had to produce its witness or the testimony could not be introduced as evidence in the CEC's 04-AFC-001 proceeding. Therefore, Manho Yeung was "unavailable" as defined by California Evidence Code section 240(a) (5):

> "240. (a) Except as otherwise provided in subdivision (b),"unavailable as a witness" means that the declarant is any of the following:
> ….5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

The CEC proceeding 04-AFC-01 is a civil proceeding.

CARE and applicant in this proceeding also were parties in the CPUC proceeding. The purpose of the CPUC proceeding was to site a transmission line replacing a pollution emitting power plant located next to occupied residential housing. The parties had the opportunity to cross examine all witnesses including Manho Yeung, the PG&E witness who stated that the construction

of the Jefferson-Martin 230 kV Transmission Project would replace the generation units now operating in San Francisco [A.02-09-043, January 12, 2004, p. 468, lines 8 - 28.] Manho Yeung also stated that PG&E wrote a letter to the CA ISO [A.02-09-043, January 12, 2004, p. 464, lines 15 - 25.] stating that conclusion:

> 15 Q Does PG&E have a position on CCSF's
> 16 efforts to site the turbines?
> 17 A Yes, we do have a position.
> 18 Q What's that position?
> 19 A That position was articulated in a letter dated
> 20 April 23rd, 2003, to Mr. Terry Winter of the ISO. In there
> 21 we said PG&E has no preference regarding the location of new
> 22 generation in San Francisco and northern San Mateo County.
> 23 The proposal to construct generation resources available, we
> 24 recognize this decision falls within the sole purview of
> 25 those wishing to site new generation."

PROCEDURAL DUE PROCESS VIOLATIONS

Intervener CARE was not given appropriate time to cross examine witnesses, present evidence and have our objections heard while inappropriately granting the Applicant such rights in violation of our due process and equal protection rights. CARE hereby objects to these actions on the basis that these actions constitute a form of retaliation for bringing our June 21, 2003 civil rights complaint (US DOE OCRD file#03-003-HQ) against the Applicant and the CEC with the US Department of Energy (US DOE) Office of Civil Rights and Diversity for actions taken to date to site the three Williams Peakers in the southeastern section of San Francisco.

> 9 HEARING OFFICER FAY: Okay. Keep in
> 10 mind, --

11 MR. BOYD: I only have one -- should be
12 quick.
13 HEARING OFFICER FAY: Right. We have
14 very few minutes left. Go ahead.
15 MR. BOYD: Thank you.
RT 5-24-06 p. 305

7 MR. RATLIFF: I'm going to object on the
8 grounds of relevance, again. And as you have
9 pointed out, these are all a matter of public
10 record. If they want to put them in their briefs,
11 the intervenors can. But there's no point in
12 going into what happened at the hearing board on a
13 procedural issue.
14 HEARING OFFICER FAY: It's been ruled
15 on. That's sustained. I think -- use your
16 limited time on different things.
RT 5-24-06 p. 315

The Hearing Officer disallowed testimony on alternative mitigation offered up by the Commission Staff Air Quality Witness Tuan Ngo during a conference call set up by the Commission Staff and the Applicant which they now characterize as a Settlement Conference despite the clear administrative record that the other Parties where fully made aware of what was offered up by Commission Staff on this conference call.

21 April 13th a letter to the Committee
22 from Steven Moss of the San Francisco Power
23 opposing a proposal for applicant to provide
24 offset funds to retrofit fireplaces and wood
25 stoves.
RT 4-27-06 p. 14

5 On April 21st the Committee issued a
6 ruling regarding San Francisco Power's motion
7 granting leave to file testimony on limited areas
8 by May 1. On April 21st intervenors Potrero
9 Boosters Neighborhood Association and Dogpatch
10 Neighborhood Association filed a similar motion
11 seeking to file late testimony and to require
12 community benefit funds be included as a condition
13 of certification.

RT 4-27-06 p. 16

21 And yesterday the Committee issued a
22 ruling regarding the intervenors PBNA and DNA,
23 those are the neighborhood associations, motion,
24 again granting leave to file limited testimony by
25 May 1st.
RT 4-27-06 p. 16

The Hearing Officer demonstrated prejudice against CARE by then allowing CCSF to be given an opportunity to redirect its air quality witness at the May 31 hearing when Ms. Sol refused redirect on May 22.

8 HEARING OFFICER FAY: Any redirect, Ms.
9 Sol,?
10 MS. SOL_: No.
RT 5-22-2006 P. 292

1 The second thing that I'd like to note
2 with regard to the hearing notice that went out is
3 that we would like to do some very brief redirect.
4 Last hearing we were trying to get through so that
5 Mr. Greenberg didn't have to reappear. But we
6 have a few questions that we think are important
7 to clarify the record on air quality.
RT 5-31-06 p. 26

16 HEARING OFFICER FAY: Yes. I want to
17 confirm that all three of those points you raised
18 with me.
RT 5-31-06 p. 26

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 5-31-06 p. 26

9 MR. SARVEY: I think it's a little
10 unusual to have redirect after a seven-day recess.
11 HEARING OFFICER FAY: It is a little
12 unusual. We're --
13 MR. SARVEY: Well, I --
14 HEARING OFFICER FAY: -- just trying to

15 accommodate because the applicant accommodated the
16 staff witness who had a scheduling conflict.
RT 5-31-06 p. 26

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.

Michael Boyd President of CARE asked for phone access to the evidentiary hearings located at the distant location of Sacramento California for Mr. Boyd, Mr. Brown and interested members of the public.

13 And we already took appearances, and I
14 see no reason to spend further time on that. The
15 same parties are present. I just will ask if we
16 have any members of the public present at this
17 hearing who may wish to address the Commission at
18 some time.
19 All right. Do we have any parties
20 online?
21 MR. BARTSCH: Yes, Nick Bartsch, Public
22 Adviser's Office. We understand that Francisco
23 DaCosta may be calling in; and watching the
24 monitor here so that to catch his call. And also
25 possibly Mike Boyd indicated that he may call in.
5-1-06 p. 1

3 MR. SARVEY: Do you want to check and
4 see if Mr. Boyd's on the phone first, or do you
5 want me to go ahead?
6 HEARING OFFICER FAY: Well, we can ask,

7 but you are the next in order. Mr. Boyd, are you
8 on the line? Mr. Boyd. Is any representative of
9 CARE on the line? Okay, go ahead, Mr. Sarvey
RT 5-1-06 p. 31

By denying CARE and other interested members of the public phone access to the meeting the Commission denied CARE its procedural due process rights to meaningful and informed participation which when combined with the other actions by the Committee identified herein is evidence of retaliation for bringing our June 21, 2003 civil rights complaint (US DOE OCRD file#03-003-HQ) of discrimination against the Applicant and the CEC with the US Department of Energy (US DOE) Office of Civil Rights and Diversity for actions taken to date to site the three Williams Peakers in the southeastern section of San Francisco, as was identified by the April 17, 2006 Testimony of Lynne Brown at pages 7 to 8.

CAlifornians for Renewable Energy (CARE) asked me to prepare testimony on potential environmental and associated socioeconomic impacts of the proposed San Francisco Energy Reliability Project on Purpose and Need, Geology, and on the public health of Southeast San Francisco residents will bare from the project, which involves the continued generation of electrical power in the disproportionately impacted low-income community of color of Bayview Hunters Point in San Francisco. A copy of my resume is attached with my testimony. The City of San Francisco Peaker combustion turbine project is proposed to be located on the other side of PG&E’s Hunters Point Power Plant right outside my window where I can see it. Now you want to put another one there not to shut down PG&E’s plant but now its because the City is claiming it’s going to get Mirant to shut down the Potrero Plant, and that is a lie just like the first Application by the City was a lie that the Peakers where going to shut down PG&E’s Hunters Point power plant when the first Application was filed. This lie was repeated over and over again

in the alternative, air quality, transmission, and biological resources sections with out any evidence to prove it. This project has nothing to do with reliability so its very name is a fraud. It is about the City wanting to be like Enron and Calpine at my expense. The Commission's staff assessment didn't talk about liquefaction of the project site during an earthquake or that the serpentine soil is filled with asbestos dust.

My qualifications for testifying on the project are based on the fact that I am low-income African American member and Vice-President of the board of directors of CARE who resides in the Bayview Hunters Point community of San Francisco California and I am therefore qualified to testify on potential environmental and socioeconomic impacts of the proposed project on Purpose and Need, Geology, and on the public health.

I brought a civil rights Complaint against the City and County of San Francisco in June 2003 with the US Department of Energy Office of Civil Rights and Diversity alleging that the City was siting these Peakers in my neighborhood because I'm poor and black and to the degree the CEC Staff is supporting the City in their efforts to discriminate against me you are also discriminating against me. Now I understand the US DOE has dropped their investigation of Cal ISO but I know they haven't finished investigation the City and CEC. The fact that the Commission Staff didn't push for SCONOx emission controls, or the airport site, instead of putting the Peakers in my neighborhood shows the CEC is discriminating against me and my neighbors because we are poor and black.

It is my opinion that this prepared testimony is valid and accurate with respect to the issues that it addresses. I am personally familiar with the facts and conclusions related in the prepared testimony and if called as a witness could testify competently thereto. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge.

The April 17, 2006 Testimony of Lynne Brown was accepted in to evidence at the May 31, 2006 evidentiary hearing without objection or cross by the Applicant or CEC Staff. If the Applicant or CEC had any objections to the Testimony of Lynne Brown on the issues of alleged discrimination he identified they could have done so at that time but in failing to do so certainly waived their rights to object to these allegations going forward.

MEMORANDUM OF UNDERSTANDING VIOLATED THE PUBLIC NOTICE REQUIREMENTS UNDER THE BAGLEY-KEENE OPEN MEETING ACT

The San Francisco Bay Regional Water Quality Control Board (SFBRWQB)[5] and the California Energy Commission (CEC)[6] took

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[5] In response the SFBRWQCB recently claimed that the Bagley-Keene Open Meeting Act did not apply since there was no meeting of the Board scheduled to discuss the MOU. The Board has delegated authority to its Executive Officer to act on the MOU in its behalf.

The Water Code expressly provides that the Board may delegate certain authorities to its Executive Officer. Division 7 of the Water Code, section 13223 (a) addresses delegation of its authority to the Executive Officer. It provides that each Regional Board may delegate any of its powers and duties vested in it by this Division to its Executive Officer excepting only the following:

(1) the promulgation of any regulation;

(2) the issuance, modification, or revocation of any water quality control plan, water quality objectives, or waste discharger requirement;

(3) the holding of any hearing on water quality control plans;

(4) the issuance, modification, or revocation of any cease and desist order;

(5) the application to the Attorney General for judicial enforcement but excluding cases of specific delegation in a cease and desist order and excluding the cases described in subdivision (c) of Section 13002 [action by Attorney General to enjoin pollution or nuisance] and Sections 13304 [action by Attorney General for injunction to cleanup and abate] and 13340 [action by Attorney General to seek injunction of a discharge constituting an emergency].

Water Code section 13223 (b) further states that:

"(b) Whenever any reference is made in this division to any action that may be taken by a regional board, such reference includes such action by its executive officer pursuant to powers and duties delegated to him by the regional board."

In 1970 the Regional Board delegated the powers and duties vested in it by the Water Code to its Executive Officer (Resolution No. 70-11), with the exception of those specifically listed in Water Code section 13223(a).

SFBRWQCB fails to understand that the fact that no meeting occurred is precisely the basis of CARE's Notice to Correct or Cure. As determined in an Appeals Court case MOUs are in fact subject to the requirements of the ACT.

In the case of MELVIN SHAPIRO, Plaintiff and Respondent, SAN DIEGO CITY COUNCIL, Defendant and Appellant, No. D037323, in the Court of Appeal of the State of California, Fourth Appellate District Division One, (Superior Court. No. GIC 737965), filed March 5, 2002, APPEAL from a judgment of the Superior Court of San Diego County, Judith McConnell, Judge. Affirmed.

The defendant City Council of the City of San Diego (City Council) appeals a judgment issued under the Ralph M. Brown Act (Brown Act) (Gov. Code,[FOOTNOTE 1] § 54950 et seq.) to compel it to comply with certain duties under the Brown Act in closed session discussions with its real estate negotiators, concerning the posting of agenda items and the restriction of discussion within such closed sessions to the posted agenda items. (§ 54956.8; § 54954.5, subd. (b); § 54954.2, subd. (a).) This action was brought by plaintiff and respondent Melvin Shapiro, seeking declaratory and injunctive relief to require fuller disclosure of the items under discussion in the context of real estate negotiations involving the overall large redevelopment project to create a baseball ballpark in the East Village section of the City of San Diego (the City), as initiated by a 1998 voter approved proposition.

On appeal, the City Council contends the trial court exceeded the scope of its authority in ordering injunctive relief, and misapplied the Brown Act statutory scheme in ruling upon the scope of the disclosures to be made in connection with closed session real estate negotiations and the scope of the discussions that could take place in such closed sessions. On de novo review of the statutory issues presented, and after reviewing the record, we conclude the trial court' s decision was well within the scope of its authority and fully justified by the record.

In this case, the actual discussions in closed session extended to topics such as briefing on land acquisition matters, design work of architects, engineers, and infrastructure and parking developments. Also, such topics as capping interim expenses, environmental impact report (EIR) considerations, issues of alternative sites, traffic, naming rights, expert consultants and staff were discussed. Such policy considerations as the impact of the ballpark project on the homeless were discussed at closed session. All these topics confirm the City's position that this redevelopment project, as memorialized

actions[7] alleged to have been taken in violation of California Government Code §§11120 et seq. the Bagley-Keene Open Meeting Act[8] in that the SFBRWQB and the CEC failed to provide the public proper notice prior to the June 5, 2006 execution of the *Memorandum of Understanding between the California Energy Commission Staff and the Staff of the San Francisco Bay Regional Water Quality Control Board*.

In addition to doing what amounts to the public's business illegally in secret, such actions, denied the public an opportunity for meaningful and informed public participation in the MOU prior to its execution on June 5th. Additionally this action failed to meet the public notice requirements under the Bagley-Keene Open Meeting Act which requires 10 days advanced notice of the meeting. Additionally the Open Meeting Act requires that the public be given an opportunity to speak at the meeting while no agenda item allowing public participation is listed on any meeting agenda of either Agency.

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in the MOU and related agreements, is indeed a complex real estate based transaction. That characterization, however, does not negate the requirements of the Brown Act when agenda items are noticed concerning real estate interests, such as purchase and sale of real property on which the anticipated development will be located.

[6] "§ 11121.2. As used in this article, "state body" also means any board, commission, committee, or similar multimember body which exercises any authority of a state body delegated to it by that state body."

[7] § 11122. Action taken; defined As used in this article "action taken" means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.

[8] The Act expressly prohibits the use of direct communication, personal intermediaries, or technological devices that are employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body outside of an open meeting. (§ 11122.5(b).)

The failure to provide proper notice to CARE and other members of the public violated the Bagley-Keene Open Meeting Act California Codes Government Code §§11120 et seq. which requires 10 days advanced notice be provided on the internet. § 11125(a) of which provides:

> The state body shall provide notice of its meeting to any person who requests that notice in writing. Notice shall be given and also made available on the Internet at least 10 days in advance of the meeting, and shall include the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting. The written notice shall additionally include the address of the Internet site where notices required by this article are made available."

These acts are a substantial violation of central provisions of the Bagley-Keene Open Meeting Act to provide 10 days advanced notice of the June 5, 2006 execution of the *Memorandum of Understanding between the California Energy Commission Staff and the Staff of the San Francisco Bay Regional Water Quality Control Board*.

CARE seeks the immediate revocation of said MOU including provision for a proper notice by said Agencies of said meeting with an opportunity to speak at said meeting prior to execution of said agreement in accordance with the Act, to provide CARE an opportunity to exercise our constitutionally protected due process and equal protection rights, and the public an opportunity for meaningful and informed public participation in accordance with the First Amendment constitutional rights enjoyed by citizens of the United States.

> 11 MR. RATLIFF: Mr. Fay, if I may, we
> 12 would like -- we agree with Mr. Boyd, we would
> 13 like to have Mr. Hill here, as well. But, as Mr.
> 14 Hill pointed out when I asked him to come, he
> 15 doesn't really want to be cross-examined and he

16 doesn't have any testimony for this agency. So he
17 was afraid that he would be cross-examined, I
18 think, because he asked that question.
19 His idea, his notion of the role here is
20 that they're an advisory sister agency. And that
21 when they get the documents that we're requiring
22 they'll have something to say about them.
RT 5-22-06 p. 92

7 MR. SARVEY: Yeah. Mr. Ratliff here
8 said that the Regional Water Quality Board witness
9 didn't want to appear because they didn't have the
10 studies and they didn't want to be cross-examined.
11 And this is the same dilemma that we're facing as
12 intervenors.
13 We can't even present witnesses because
14 we don't have any ecological risk assessment; we
15 can't present a biologist; we don't have a risk
16 management assessment, so I can't bring in my
17 experts.
18 And once this license is granted all
19 this is going to be determined outside the CEC
20 process. And that's not the nature of the CEC
21 process, to get full disclosure of all significant
22 impacts. And we have nothing but speculation
23 here. We're saying, oh, we don't know if there's
24 damage to the --
RT 5-22-06 p. 95

The *MOU* fails to meet the requirements for meaningful and informed public participation under the California Environmental Quality Act (CEQA), the Warren-Alquist or other applicable state or local LORS.[9] The mandate of public participation requires members of the public and parties in Commission proceedings to have access to documents and information they need to participate meaningfully.

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[9] Laws, ordinances, regulations, and standards, in the broadest sense.

IT IS IMPROPER FOR THE APPLICANT TO DEFER ITS PROPOSED REMEDIAL ACTIONS TO CLEAN UP THE SITE UNTIL AFTER THE PERMIT IS ISSUED FOR THE PROJECT BY THE CEC

In order for there to be both meaningful and informed public participation, as required by statutes like the Warren-Alquist Act, and CEQA, it is required that public participation be both well informed (*e.g.*, based on full and fair disclosure of all relevant material), and meaningful or effective (*i.e.*, a full, fair and constitutionally adequate opportunity to influence the decision makers and otherwise participate in the overall environmental review, ratemaking, or rulemaking and concurrent democratic decision making processes).

Under California law, public participation violations are generally treated as presumptive, prejudicial abuses of discretion[10] requiring the setting aside of project approvals or the invalidation of other actions taken by public agencies. The *MOU* doesn't seem to understand, and certainly doesn't adequately analyze and implement these vital legal points, and the constitutional as well as social-political values they embody and seek to protect and promote.

CARE contends that it is improper for the Applicant to defer its Proposed Remedial actions to clean up the site until after the permit is issued for the project by the CEC. To do so violates the city's own ordinances, and the California Environmental Quality Act (CEQA) which requires all feasible mitigation be adopted or that the project be denied for inducing significant unmitigated adverse impacts on the environment. CEQA is primarily a public disclosure statutory scheme allowing the

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[10] 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.

affected community to be informed and members of the public to voice their opinion, and to have input, about projects that may affect their environment. CEQA requires a review of the environmental impacts of overall activities ("the whole of an action" – 14 Cal. Code Regs. § 15378(a)) defined as "projects." (Pub. Res. Code § 21065.) This strong, broad right of public participation under CEQA has a political component (i.e., CEQA allows the compilation of a record concerning the approval of development projects that can be used by the public to vote environmentally insensitive decision makers out of office come election day), the violation or deprivation of which has constitutional ramifications on an affected community as well as the public at large.

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

CEQA provides that a proposed project may have a significant effect on the environment when the possible effects on the environment are individually limited but "cumulatively considerable." (Pub. Res. Code § 21083(b); 13 Cal. Code Regs. § 15065. "'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future

projects." (14 Cal. Code Regs. § 15065.) In addition to analyzing the direct impacts of a project, the CEQA Lead Agency must also consider a project's potentially significant cumulative impacts.

Recent statutory law has invigorated CEQA's role in ensuring "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies" (i.e., environmental justice)." (Emphasis added; see SB 115, Solis; Stats. 99, ch. 690, Gov. Code § 65040.12 and Pub. Res. Code §§ 72000-720001.) In conjunction with the regulatory provisions of the federal Clean Air Act and Division 26 of the Health and Safety Code,[11] CEQA provides an ideal mechanism for ensuring that Environmental Justice will be addressed in all activities and projects that may have a significant effect on the environment.

CEQA requires that environmental documents (i.e., an environmental impact report (EIR) or equivalent) be prepared whenever a public agency proposes to undertake a discretionary activity (which is defined extremely broadly as the "whole of an action" being engaged in) that may have a significant effect on the environment. (See Pub. Res. Code §§ 21002.1, 21061, 21064, and 21080.1; see also 14 Cal. Code Regs. § 15002.)

> 5 MR. BOYD: Well, our concern is
> 6 basically the same as we've been raising which is
> 7 basically our understanding is that the Regional
> 8 Board, like the CEC, are all CEQA agencies. And
> 9 that CEQA requires a meaningful and informed
> 10 public participation in whatever the process is
> 11 that's going before that agency.
> RT 5-22-06 p. 91

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[11] This overlapping of statutory goals and requirements (see Pub. Res. Code § 21000(g), quoted above) is typical among statutory schemes aimed at protecting the public health.

“Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.” (Pub. Res. Code § 21000(e).)

The recent enactment of Public Resources Code sections 71110 through 71115, and Government Code section 65040.12, in conjunction with other statutory and regulatory requirements, such as the Bay Area Air Quality Management District State Implementation Plan, and EPA regulations, require the CCSF, CEC, as well as other agencies, to infuse Environmental Justice into every aspect of decision-making. This panoply of statutory authority supplements the general authority to “do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon [a public agency]...” (Health & Saf. Code § 39600.) Further, the rules, regulations, and standards that the CCSF, CEC, and other agencies adopt must be “consistent with the state goal of providing a decent home and suitable living environment for every Californian”4 (Id. § 39601 (c).)

Therefore the proposed project, and all associated activities constituting the “whole of an action” being carried out by the public agencies involved capable of having an adverse environmental impact (14 Cal. Code Regs. § 15378(a); see also Pub. Res. Code § 21065), and therefore the proposed San Francisco Energy Reliability Project and the MUNI Metroeast Facility considered together must be subjected to environmental review pursuant to CEQA to ensure that all the entire project’s adverse, potentially significant impacts on the Bayview Hunters Point community, as well as the entire region in which the project is located, are fully and fairly investigated, identified, analyzed, evaluated and, perhaps most importantly of all, mitigated – while also ensuring that project alternatives

capable of avoiding or reducing the impacts are considered and, if feasible, adopted.

CONCLUSION

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

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 26th day of June 2006, at Soquel California.

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