

**From:** Michael Boyd <michaelboyd@sbcglobal.net>  
**To:** <gfay@energy.state.ca.us>, Jeanne Sole <Jeanne.Sole@sfgov.org>, <docket@energy.state.ca.us>, <l\_brown369@yahoo.com>, <frandacosta@att.net>, Bob Sarvey <sarveybob@aol.com>, clifton smith <clifton.smith@sbcglobal.net>, <pao@energy.state.ca.us>, <mxy6@pge.com>  
**Date:** 6/5/2006 7:37:28 PM  
**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)

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

<b>DOCKET</b>	
<b>04-AFC-1</b>	
DATE	<u>JUN 5 2006</u>
RECD.	<u>JUN 5 2006</u>

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  
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former testimony was given.

Michael E. Boyd - President  
CALifornians for Renewable Energy, Inc. (CARE)  
5439 Soquel Drive  
Soquel, CA 95073  
E-mail: michaelboyd@sbcglobal.net

#### 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.

Dated on this 5th day of June, 2006 at Soquel, California.

Respectfully submitted,

Michael E. Boyd - President  
CALifornians for Renewable Energy, Inc. (CARE)  
5439 Soquel Drive  
Soquel, CA 95073  
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**CC:** <bhale@swater.org>, Bill Pfanner <Bpfanner.HQPO2.SacHQ@energy.state.ca.us>, <djordan@caiso.com>, Dick Ratliff <Dratliff.HQPO4.SacHQ@energy.state.ca.us>, <drp.gene@spcglobal.net>, <Gfay@energy.state.ca.us>, Jim Boyd <Jboyd.HQPO4.SacHQ@energy.state.ca.us>, <jcarrier@ch2m.com>, <jeffrey.russell@mirant.com>, John Geesman <jgeesman.HQPO4.SacHQ@energy.state.ca.us>, <joeboss@joeboss.com>, <kkubick@swater.org>, <L\_brown369@yahoo.com>, <mark.osterholt@mirant.com>, <michaelboyd@sbcglobal.net>, <michael.carroll@lw.com>, Margret Kim <Mkim.HQPO4.SacHQ@energy.state.ca.us>, <sarveybob@aol.com>, <steve4155@astound.net>, <steven@sfpower.org>, <svalkosk@energy.state.ca.us>, Martin <martinhomec@comcast.net>

Dear Gary Fay,

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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

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- (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.



Michael E. Boyd - President  
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Soquel, CA 95073  
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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.

Dated on this 5<sup>th</sup> day of June, 2006 at Soquel, California.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael E. Boyd". The signature is written in a cursive style with a large initial 'M' and 'B'.

Michael E. Boyd - President  
CALifornians for Renewable Energy, Inc.  
(CARE)  
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