

**ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION**

In the Matter of:)
)
Application for Certification)
For the San Francisco Electric)
Reliability Project)
_____)

Docket No. 04-AFC-1

DOCKET	
04-AFC-1	
DATE	MAY 5 2006
RECD	MAY 5 2006

**COMMISSION STAFF RESPONSE TO CARE'S OBJECTIONS
AND PROTEST REGARDING THE MAY 1, 2006,
EVIDENTIARY HEARING**

On May 2, 2006, Californians for Renewable Energy ("CARE") filed a document titled "Objections and Protest to May 1, 2006 evidentiary hearing." The CARE document 1) objects that CARE was unable to participate by telephone at the May 1 hearing, 2) refers to evidence that it believes it could have presented at that hearing in the form of testimony, and 3) provides a script of purported cross-examination CARE intended for Lawrence Tobias, the witness provided by the California Independent System Operator. CARE requests that the Committee recall Mr. Tobias and the Staff witness so that it can conduct cross-examination on the topic of Local System Effects. This response tries to detail the relevant facts and opposes CARE's request to recall the Local System Effects witnesses.

I. FACTUAL CONTEXT

The Committee's Notice of Evidentiary Hearings did not offer or even mention telephonic participation at the evidentiary hearings, and such participation is within the discretion of Committee chairs when they conduct hearings. (Cal. Code Regs., tit. 20, § 1203(c).) However, the Energy Commission can and frequently does provide for telephonic participation at hearings where a timely request is made.

Immediately prior to the April 27, 2006, evidentiary hearing CARE's President, Mr. Michael Boyd, contacted the Public Advisor requesting to participate telephonically in the hearing. The Public Advisor sent Mr. Boyd the single line call-in number so that he could participate. However, he did not call in during the hearing, and efforts by the Public Advisor to reach him during the hearing were unsuccessful. Thus, Mr. Boyd did not participate in the April 27 hearing.

On the morning of the May 1 hearing the Public Advisor was contacted by Mr. Francisco Da Costa, who requested to participate telephonically at the May 1 hearing. Mr. Da Costa is listed as a witness by both CARE and Robert Sarvey in their respective

pre-hearing conference statements, and he stated during the May 1 hearing that he is “affiliated” with both CARE and Mr. Sarvey.¹ Mr. Boyd called in that morning with a similar request, and also mentioned that another CARE member wanted to call in. The Public Advisor’s Office told Mr. Boyd that it was too late to set up a multi-line conference call, that one line was available, and that he would need to coordinate his participation with Mr. Da Costa. Mr. Boyd reportedly stated that he understood the situation and would coordinate with Mr. Da Costa. Mr. Boyd subsequently called in to the May 1 hearing but was unable to participate because Mr. Da Costa was participating on the single available line. Mr. Boyd asserts that Lynn Brown, another CARE member, also attempted to call in to participate telephonically but was unable to. Like Mr. Boyd, Mr. Brown had not sought a prior arrangement to participate telephonically.

Mr. Boyd asserts that he had “no duty” to arrange a call-in line in advance for his participation in the hearing. He fails to understand that the call-in opportunity must be pre-arranged, that it is an accommodation for which there is no legal requirement, and that for technical reasons it cannot be guaranteed.² Mr. Boyd was informed of the situation on May 1 and indicated that he understood and would cooperate with Mr. Da Costa in his participation. The Energy Commission has no legal obligation to provide last-minute telephonic hearing access to multiple members of CARE or its affiliates.

II. CARE’S WITNESS TESTIMONY

Like other agencies that produce environmental documents, the Commission provides that any person may comment on the sufficiency of such documents either in writing or at public hearings. However, the Commission’s process also provides the opportunity for organizations or persons to “intervene” in the proceeding and become “parties” to it; such parties have the right to present their own testimony to the Commission and to cross-examine the witnesses of other parties, and corresponding duties to comply with Committee orders and deadlines. CARE has been granted intervention so that it can participate as a party. Mr. Boyd has many years of experience participating as an intervenor in Energy Commission power plant siting proceedings, and should be accustomed to these reciprocal rights and duties.

The Committee held a Pre-Hearing Conference (“PHC”) to set the schedule for hearing on April 3, 2006. Parties who intend to participate actively in evidentiary hearings are required to state their issues, and to summarize their evidence, at such pre-hearing conferences. The Committee’s Pre-Hearing Conference Order directed all parties to file pre-hearing conference statements indicating, among other things, the topic areas

¹ Notably, although Mr. Sarvey has been granted separate party status in this proceeding, he was until March 2006 the Treasurer for CARE. The Committee suggested consolidation of Mr. Sarvey and CARE at the pre-hearing conference, but did not require it. Staff believes that it would have been appropriate to require consolidation pursuant to Government Code Section 11440.50, as the interests of the parties appear to be the same, they name each other as witnesses on various topics, and until recently all belonged to or were “affiliated with” CARE.

² A warning to this effect is currently placed in all Commission business meeting notices, which also urges would-be telephonic participants to FAX or e-mail their comments should the telephone connection fail or not be available.

in dispute and “the precise nature of the dispute,” the specific witnesses to be presented on such topics, and a “brief summary” of their testimony. CARE’s pre-hearing conference statement provided merely a laundry list of topic areas, identified no specific factual issues, summarized no proposed testimony, and identified no witnesses.

At the PHC, CARE was represented by Mr. Lynn Brown, **who told the Committee CARE would not be presenting witness testimony in any area.** (April 3, 2006, Pre-Hearing Conf. Transcript, p. 86.) Both Mr. Brown and Intervenor Sarvey expressed their intent to cross-examine Staff and ISO witnesses, but indicated that there would be no witness testimony. The Committee ordered all parties to file any additional testimony by April 17, 2006. CARE electronically filed the testimony of Mr. Martin Homec³ on April 27, 2006, 10 days after that deadline, and in conflict with Mr. Brown’s statement at the PHC that there would be no CARE testimony.

Staff recognizes that CARE is a non-profit organization of unknown membership that professes limited resources. It has been granted “financial hardship” status by the Commission, which means that the Commission and its staff make certain accommodations to CARE, such as allowing it to merely file its documents electronically, and assuming the burden (for CARE) of providing proof of service and distribution of its numerous and sometimes voluminous filings to the Committee, Staff, and other parties to the proceeding. However, Staff believes that CARE, as a party to the siting proceeding, should be required to comply with Commission orders, including the imminently reasonable requirements of the Pre-Hearing Conference Order and the subsequent order setting a deadline for testimony. CARE complied with neither, and it should not be allowed to put in evidence this late (and never previously identified) testimony.

III. CARE’S CROSS-EXAMINATION

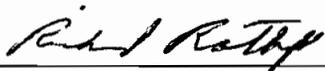
CARE’s Objections include an “offer of proof” indicating what questions CARE would have asked the Local System Effects witnesses if CARE had participated telephonically. The majority of these questions concern either CARE’s views about the topic of environmental justice or are specific to a three-year old complaint filed by CARE with the U.S. Department of Energy’s Office of Civil Rights, which included extremely general allegations that the Energy Commission and City of San Francisco may be violating the civil rights of CARE’s membership. Needless to say, such questions are entirely outside the scope of the Local System Effects testimony, which is concerned with the technical topic of how to provide reliability to the City of San Francisco’s electrical system. Other CARE questions address the cost of the project, which is also outside the scope of the witnesses’ testimony. Those relatively few questions addressing system reliability, such as the need--for reliability purposes--to place combustion turbines north

³ In addition, Mr. Homec’s testimony was not labeled as addressing the topic of Local System Effects, the topic now assigned to it by Mr. Boyd. In content it could reasonably be considered to be either testimony regarding Local System Effects or Project Alternatives. Mr. Homec was not present at the May 1 hearing.

of the Martin Substation, were addressed thoroughly by Mr. Sarvey in his cross-examination of the witnesses.

The Committee has tried to schedule the topics with the greatest potential public interest for hearing in San Francisco. The agenda for the San Francisco hearings is already very full. Adding still another topic for such hearings (even assuming that the witnesses are available) will reduce the time available for other issues, and would be a questionable expenditure of agency resources and Committee time. CARE has failed to provide any compelling reason for a "redo" of the previous evidentiary hearing. For all the above reasons, Staff opposes recalling the Local System Effects witnesses. Of course, CARE could still provide comments on the hearing testimony, including what now should be considered the comments of Martin Homec.

Date: May 5, 2006



RICHARD C. RATLIFF
Staff Counsel

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE
STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION
FOR THE SAN FRANCISCO ELECTRIC
RELIABILITY PROJECT

Docket No. 04-AFC-01
PROOF OF SERVICE
**Revised 2/17/06*

DOCKET UNIT

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Attn: Docket No. 04-AFC-01
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DECLARATION OF SERVICE

I, Scott McDonald, declare that on May 5, 2006, I deposited copies of the attached COMMISSION STAFF RESPONSE TO CARE'S OBJECTIONS AND PROTEST REGARDING THE MAY 1, 2006, EVIDENTIARY HEARING, in the United States mail at Sacramento, California with first class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I declare under penalty of perjury that the foregoing is true and correct.

 5-5-06

Scott McDonald

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