

DOCKET

04-AFC-1

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Californians for Renewable Energy, Inc.

v.

Docket No. EL06-89-000

California Independent System Operator Corporation

**MOTION FOR REHEARING BY
CALIFORNIANS FOR RENEWABLE ENERGY, INC. (CARE)**

1. This motion is filed pursuant to the FERC Rules of Practice and Procedure, 18 CFR part 385. CALifornians for Renewable Energy, Inc. (CARE) hereby respectfully submits its request for rehearing of the “ORDER REJECTING COMPLAINT” issued on October 19, 2006 (117 FERC ¶ 61, 072). CARE filed a complaint against the California Independent System Operator Corporation (CAISO). CARE’s complaint alleges that the CAISO wrongly issued determinations pursuant to its FERC issued tariff by providing testimony in support of a power plant siting application submitted by the City and County of San Francisco (San Francisco) in a proceeding pending before the California Energy Resources Conservation and Development Commission (CEC).

2. The FERC order rejecting CARE’s complaint was deficient because it did not specify the proper federal forum for the complaint. If the FERC is not the proper federal venue, what federal forum is?

3. The October 19, 2006, order also did not allow CARE’s motion to answer the CAISO answer or the San Francisco filing. CARE made the motion to answer San Francisco’s filing because the San Francisco filing wrongly included the name and address of a person purporting to represent a California state agency that is no longer funded by the State budget. San Francisco’s pleadings in this FERC complaint as well as the CEC proceedings include a representative of a California state agency that ceased to operate¹ in 2004, the California Consumer Power and Conservation Financing Authority. CARE protests the San Francisco

¹ See <http://www.capowerauthority.ca.gov/News/UpcomingBoardMeetings.htm>

representation that a California state agency supports its position in this FERC proceeding, Docket No. EL06-89, because there is no such agency.

4. This same misrepresentation was made during the August 2, 2006 hearing before the CEC in CEC Docket No. 04-AFC-01.

5. The CAISO testified in hearings and issued opinions by letter referring to the federal authority granted by FERC in its tariffs. The CEC issued a decision (Order No. 06-1003-01 in Docket No. 04-AFC-001, beginning on page 91 of the decision) citing a power plant using the CAISO testimony as evidence even though the CAISO had exceeded its statutory authority by presenting the evidence. The health and safety effects of using the selected site have still not been assessed or remediated according to State law.

6. The CAISO testimony used as evidence cited its FERC granted authority as a basis, together with State law, for making its determination. See

http://energy.ca.gov/sitingcases/sanfrancisco/documents/intervenors/2006-03-13_TESTIMONY_L_TOBIAS_CA_ISO.PDF

7. The CEC decision stated that the CEC had no authority to oversee the CAISO's actions, but that the FERC had the authority to oversee the CAISO's actions. This statement was made in the final CEC decision on pages 93 and 94. <http://energy.ca.gov/2006publications/CEC-800-2006-007/CEC-800-2006-007-CMF.PDF>

8. FERC reviewed the CAISO's procedures for determining resource requirements and found them to be inadequate. FERC addressed the CAISO's procedures for determining Local Capacity Area Resource Requirements in 20060921-3091 Issued by FERC OSEC 09/21/2006 in Docket#: ER06-615-000². The relevant part of that order is located on Page 319, paragraph 1167: "Furthermore, we note that there is some ambiguity in the MRTU Tariff as to which reliability standards the CAISO will use in its technical study to determine local capacity area resource requirements. The MRTU Tariff simply defines the applicable reliability criteria as reliability standards established by NERC, WECC, and Local Reliability Criteria as amended from time to time, including any requirements of the NRC. For example, ambiguity as to which

² <http://www.caiso.com/1878/1878f9725ef80.pdf>

standards the CAISO will use in its determination may be created by the fact that some local reliability standards as well as some of WECC's standards are more stringent than NERC's standards. Accordingly, until Commission-approved reliability standards are in place, we direct the CAISO to incorporate into the MRTU Tariff which set of reliability criteria it will use in developing the local capacity area resource requirements. We further require the CAISO to distinguish in the MRTU Tariff between the reliability needs addressed by the RMR technical study process and the local capacity study process, so that it is clear which criteria are being addressed in each process. We direct the CAISO to make a compliance filing within 60 days of the date of this order."

9. CARE asks the FERC to reconsider rejecting CARE's complaint in light of the preceding finding that the CAISO's reliability standards for determining local capacity area resource requirements are ambiguous. CARE believes that the standards are not only ambiguous but unenforceable because the CAISO is ignoring the statutory mandate for its existence as a California public purpose corporation. The CAISO 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, and Division 1 of the Public Utilities Code of the State of California.

The statutory requirements state that CAISO 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. The CAISO hasn't complied with its statutory mandates and so all of its noncompliant determinations are unenforceable.

LIST OF EXCEPTIONS

10. A list of numbered exceptions, including a specification of each error of fact or law asserted:

- 1) FERC should specify the federal venue for review of a CAISO action pursuant to a FERC issued tariff. The CEC decision stated that the CEC did not have authority to tell the CAISO to not to testify pursuant to a federal preemptive mandate issued by FERC; if the FERC also refuses to act, citizens suffering from the CAISO's improper actions have no recourse in law. This is prohibited by the United States Constitution guarantees of equal protection

and due process of laws.

- 2) FERC should order the CAISO to rescind its statements concerning the siting of San Francisco's power plant because the CAISO tariff does not preempt California's statutory authority requiring the CAISO to coordinate with state environmental and public health authorities.
- 3) FERC found the CAISO's procedures for determining Local Capacity Area Resource Requirements ambiguous and in need of revision in 20060921-3091 Issued by FERC OSEC 09/21/2006 in Docket#: ER06-615-000³. A compliance filing is ordered for 60 days from the date of the order. CARE's complaint should be reconsidered in the context of this order.
- 4) The San Francisco pleadings in this FERC complaint as well as the CEC proceedings include a representative of a California state agency that ceased to operate in 2004, the California Consumer Power and Conservation Financing Authority. CARE protests the San Francisco representation that a California state agency supports its position in this FERC proceeding, Docket No. EL06-89, because there is no such agency.
- 5) The CEC refused to allow relevant testimony from a California Public Utilities Commission (CPUC) proceeding (Application "A."02-09-043) to be entered into evidence. This testimony is relevant to the complaint CARE submitted to FERC because the testimony in question addresses the local capacity area resource requirements for the SFERP that are at issue in this complaint. The testimony is admissible in the CEC proceedings because it falls within the hearsay exception for prior testimony in an administrative proceeding held for similar purposes and with the same parties present as provided for in California law.⁴

DISCUSSION

11. CARE asks the FERC to order the CAISO to rescind its statements concerning the

³ <http://www.caiso.com/1878/1878f9725ef80.pdf>

⁴ California Evidence Code sections 240, 1290, 1291, and 1292

SFERP because the CAISO issued its approval without considering the impact on the community as required by the CAISO's articles of incorporation. Siting the SFERP 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.

12. The land use section of the Final Staff Assessment of the San Francisco Electric Reliability Project, Posted⁵ on the CEC website for Docket No. 04-AFC-01 on 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).”

13. 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

⁵ <http://www.energy.ca.gov/2005publications/CEC-700-2005-021/CEC-700-2005-021-FSA.PDF>

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

14. 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.”

15. Applicant's witness Anne Eng stated at the May 31, 2006, hearing that the southeastern portion of the City and County of San Francisco is such an environmental justice area. Applicant insists that the SFERP is necessary and must be located at the proposed site because of a CAISO 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 State⁶ and Federal constitutions.

FERC IS THE ONLY AUTHORIZED VENUE

16. “Under 16 USCS § 824(a), the business of transmitting and selling electric energy is said

⁶ 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. ...

to be affected with public interest, and federal regulation of that portion of that business is declared necessary.” *Jersey Cent. Power & Light Co. v Federal Power Comm'n* (1943) 319 US 61, 87 L Ed 1258, 63 S Ct 953.

17. In this case, the public interest is to provide a venue for the public to seek enforcement of applicable laws. The CAISO is acting pursuant to a FERC issued tariff granting the CAISO preemptive authority. The CEC is following the CAISO determinations because the FERC has given the CAISO authority to make these determinations. The FERC is the only venue to argue this complaint because only the FERC has the authority to enforce the implementation of its tariffs. Since the CEC explained that it does not have the authority to order the CAISO to confine its activities to those defined in its statutory mandate, CARE asks the FERC to perform that task or to tell CARE the proper venue and forums for this.

18. CARE is asking FERC to order the CAISO to comply with the various state and federal laws regulating the CAISO. CARE is not asking the FERC to decide individual civil rights discrimination issues. The law in this instance is stated as follows: “Grant of authority in Federal Power Act to promote "public interest" does not charge Federal Power Commission [now Federal Energy Regulatory Commission] with advancing all public interests, but only those related to substantive provisions and purposes of Act and does not convey jurisdiction to determine individual employment discrimination complaints.” *NAACP v Federal Power Com.* (1975, App DC) 172 US App DC 32, 520 F2d 432, 10 BNA FEP Cas 3, 9 CCH EPD P 9917, affd (1976) 425 US 662, 48 L Ed 2d 284, 96 S Ct 1806, 12 BNA FEP Cas 1251, 11 CCH EPD P 10909.

JURISDICTION

19. FERC’s authority is stated in part 39 of Title 18 of the Code of Federal Regulations.⁷

⁷ Authority: 16 U.S.C. 824o. Source: Order 672, 71 FR 8736, Feb. 17, 2006, unless otherwise noted. PART 39_RULES CONCERNING CERTIFICATION OF THE ELECTRIC RELIABILITY ORGANIZATION; AND PROCEDURES FOR THE ESTABLISHMENT, APPROVAL, AND ENFORCEMENT OF ELECTRIC RELIABILITY STANDARDS [Revised as of April 1, 2006]

Sec. 39.2 Jurisdiction and applicability.

(a) Within the United States (other than Alaska and Hawaii), the Electric Reliability Organization, any Regional Entities, and all users, owners and operators of the Bulk-Power System, including but not limited to entities described in section 201(f) of the Federal Power Act, shall be subject to the jurisdiction of the Commission

20. The issues presented by CARE are not power plant siting issues. The SFERP is being constructed to maintain the reliability of the bulk power system. The facility which is the subject of the complaint, the SFERP, is a part of the bulk power system because the CEC and the CAISO state that it is needed to maintain transmission system reliability.⁸ The CAISO made this determination pursuant to authority FERC granted by issuing a tariff to the CASIO. Therefore, FERC has jurisdiction and is not prohibited from asserting its jurisdiction by 16 USCS 824, Section 201 of the Federal Power Act of 2005.

21. The relevant part of Section 201, 16 USCS 824(b) (1) states: “. . . The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [16 USCS § § 824 et seq.] and the Part next following [16 USCS § § 825 et seq.], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.”

22. The FERC order that is being appealed stated that FERC had no jurisdiction over the SFERP by authority of the following judicial cases: *Montana Megawatts I, LLC*, 107 FERC ¶ 61,140, at P 6 (2004), [Cleco Power LLC, 101 FERC ¶ 61,008, at P 117, order on reh'g, 103 FERC ¶ 61,272 \(2003\); American Municipal Power-Ohio, Inc., 58 FERC ¶ 61,182, at 61,566 \(1992\).](#)

23. The Cleco Power LLC case merely states that states retain siting jurisdiction, a fact that CARE does not dispute. CARE is asking the FERC to oversee the CAISO's implementation of the FERC authorized tariff authority. As the CEC said on page 94 of its decision concerning the SFERP, the FERC retains jurisdiction over the CAISO's FERC authorized activities because federal determinations preempt state determinations. Thus, a state cannot overrule a FERC authorized tariff granted to the CAISO. This is a question separate from authority to site energy

for the purposes of approving Reliability Standards established under section 215 of the Federal Power Act and enforcing compliance with section 215 of the Federal Power Act.

⁸ *ibid.* As used in this part: Bulk-Power System means facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof), and electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

facilities.

24. The American Municipal Power-Ohio, Inc. case addresses siting transmission facilities but does not reach the issue of wrongful activity by a state public benefit corporation misusing the preemptive power authorized by a FERC issued tariff. Instead the FERC order addresses the following issue: “Yet, we agree with Ohio Edison's assertion that we possess no authority to authorize the construction of transmission lines. Indeed, we wish to make clear that we have no intention of intruding upon state or other authority with respect to facility siting and construction.” CARE is not asking the FERC to intrude on siting and construction but to enforce the laws and regulations applicable to the CAISO’s FERC tariff activities.

CAISO’S WRONGFUL ACTIVITY

25. The full name of the corporation is "California Independent System Operator Corporation" and referred to as “CAISO” in this document. 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.

26. The California Public Utilities Code sections 345 through 352.7 are the applicable state law. Section 345.59 specifically states the necessary steps for the CAISO to conduct its

⁹ 345.5. (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.

operations. The CAISO 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.

27. The CAISO testimony in this proceeding shows that it reviewed San Francisco's proposed new generation project in accordance with Amendment 39 of the CAISO tariff, but did not consult and coordinate with the San Francisco Bay Regional Water Quality Control Board (RWQCB). In fact, the CAISO 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.

28. Testimony by the RWQCB in the CEC proceedings in CEC docket no. 04-AFC-001 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 CAISO issued its November 11, 2003, approval of applicant's project without complying with applicable state law. The CAISO cannot 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 CAISO as provided for by CPU code section 345.5.

29. *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].)"

30. The CAISO has violated a statutory mandate for their activity and the CAISO's November 11, 2003, approval was *ultra vires* of its statutory mandate. The CAISO cannot approve of the SFERP until after it has complied with its statutory mandate.

31. 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

(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]

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.”

32. The CEC signed a memorandum of understanding with the RWQCB on June 5, 2006, and has not provided any similar memorandum signed by the CAISO and the RWQCB. Therefore, the CEC should not approve the San Francisco application for certification, 04-AFC-001, the application to site the SFERP.

EXCEPTION NO. 5 - EXCLUDED TESTIMONY

33. CARE presented testimony concerning the need for the SFERP in the CEC proceedings, but the testimony was not admitted into evidence. The CAISO testimony was admitted even though it was wrongfully submitted as a lawful representation. CARE asks the FERC to direct the CAISO to rescind all of its participation in the CEC case for siting the SFERP.

34. The CEC refused to allow relevant testimony from a California Public Utilities Commission (CPUC) proceeding (Application “A.”02-09-043) to be entered into evidence. CARE presented evidence for the need of the SFERP. CARE’s evidence was the testimony and hearing transcript from a CPUC proceeding addressing the need for additional facilities in the City of San Francisco. The testimony and hearing transcripts presented the opinions of Pacific Gas and Electric Company (PG&E), the electric utility serving the City of San Francisco.

35. California law on the issue of the admissibility of CARE’s evidence is stated in California Evidence Code sections 240, 1290, 1291, and 129210. The testimony by PG&E’s

¹⁰ 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 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.

employee, Manho Yeung, in the CPUC proceeding, A.02-09-043, is admissible into evidence in the CEC proceeding as an exception to the hearsay rule because the CEC regulation, section 121211, allows the CEC to use “Hearsay evidence . . . to support a finding unless it would be admissible over objections in civil actions.”

36. 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.

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

38. 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

¹¹ 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 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.

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."

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

40. 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.

CONCLUSION

41. CARE asks FERC to grant the relief described in its complaint and any other relief deemed appropriate.

Respectfully submitted,



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Certificate of Services

I hereby certify that I have this day served the foregoing document upon each Respondent and the Secretary of the Commission via US mail, and other Interested Agency via email if available, until such time as the restricted service list is established for the above captioned matter. Rule 2010(f)(3) provides that you may serve pleadings by email. I further certify that those parties without electronic mail have been served this day via US mail.

Dated on this 16th day of November 2006.

Respectfully submitted,



President, CARE

Verification

I am an officer of the Complainant 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 November 16th, 2006, at Soquel, California



Michael E. Boyd – President, CARE,
CALifornians for Renewable Energy, Inc.