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11 In the Matter of:  
12 Application for Certification  
13 for the PUENTE POWER PROJECT

Docket No. 15-AFC-01

14 APPLICANT'S RESPONSE TO MOTION TO  
15 STRIKE APPLICANT'S REBUTTAL  
16 TESTIMONY

17 Applicant hereby responds to the Motion to Strike Applicant's Rebuttal Testimony filed  
18 by intervener City of Oxnard ("City") on January 30, 2017 (CEC TN #215666) ("Motion"). In  
19 its Motion, the City asserts that portions of Applicant's Rebuttal Testimony filed on January 24,  
20 2017 (CEC TN #215553) should have been filed with its Opening Testimony on January 18,  
21 2017, and requests that the Committee strike those portions of Applicant's Rebuttal Testimony.

22 **A. Summary of Motion and Applicant's Response**

23 The specific portions of Applicant's Rebuttal Testimony that are the subject of the  
24 Motion (hereinafter referred to as the "Subject Declarations") are as follows:

- 25 • Declaration of Mark Hale Regarding Alternative Sites – Archaeological Resources  
26 (Applicant's Exhibit No. 1123);
- 27 • Declaration of Jeremy Hollins Regarding Alternative Sites – Historic Architectural  
28 Resources (Applicant's Exhibit No. 1124);

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- Declaration of Julie Love Regarding Alternative Sites – Biological Resources (Applicant’s Exhibit No. 1126);
- Declaration of Tim Murphy Regarding Alternative Sites – Land Use (Applicant’s Exhibit No. 1129);
- Declaration of George Piantka Regarding Project Alternatives (Applicant’s Exhibit No. 1130);
- Declaration of Gary Rubenstein Regarding Alternative Sites – Aviation Hazards (Applicant’s Exhibit No. 1133);
- Declaration of Gary Rubenstein Regarding Alternative Sites – Environmental Justice (Applicant’s Exhibit No. 1137);
- Declaration of Brian Theaker Regarding Transmission Interconnection for Alternative Sites (Applicant’s Exhibit No. 1134);
- Declaration of Tricia Winterbauer Regarding Alternative Sites – Site Contamination Issues (Applicant’s Exhibit No. 1135); and
- Declaration of Julie Love Regarding the Presence of Wetlands on the Puente Project Site (Applicant’s Exhibit No. 1125).

Not that there are any limits on the number of pages that may be submitted as Rebuttal Testimony, but to correct the misperception created in the Motion that the Subject Declarations comprise hundreds of pages, Applicant notes that the total number of pages in the Subject Declarations (excluding attached witness qualifications) is 54 pages (double-spaced, pleading format).

The thrust of the City’s argument is that because the matters addressed in the Subject Declarations were raised in the CEC Staff’s Final Staff Assessment (FSA), Applicant was required to address them in its Opening Testimony, and was precluded from addressing them in

1 its Rebuttal Testimony. We address as a secondary matter the City’s assertion that matters  
2 raised in the FSA may be rebutted only through Opening Testimony and not through Rebuttal  
3 Testimony. However, that question need not be answered in order to determine that the Motion  
4 is without merit because the Subject Declarations directly rebut assertions, analysis, conclusions  
5 and recommendations contained in the Opening Testimony of the interveners (particularly that of  
6 the City), and are therefore unquestionably appropriate Rebuttal Testimony.  
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8 **B. Applicant’s Detailed Response**

9 **1. The Subject Declarations Directly Rebut City’s Opening Testimony<sup>1</sup>**

10 The vast majority of the City’s Opening Testimony is devoted to supporting the City’s  
11 position that inland alternative sites, including the Ormond Beach Area Off-Site Alternative and  
12 the Del Norte/Fifth Street Off-Site Alternative specifically, are both feasible and environmentally  
13 superior to the proposed Project site.  
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15 The testimony of City Councilmember Carmen Ramirez is focused exclusively on the  
16 City’s opposition to power generating facilities along the coast, implying a preference, if not  
17 support, for inland alternative sites. As stated by Councilmember Ramirez: “I submit this  
18 testimony on my own behalf regarding the disproportionate presence of industrial facilities  
19 located along the coast in the City of Oxnard.” (emphasis added) (CEC TN #215419, p. 1).  
20 Councilmember Ramirez raises no objections to development of the Project on an inland  
21 alternative site.  
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23 The City’s Fire Chief is more explicit in his support for inland alternative sites, stating in  
24 his testimony: “It is my expert opinion as a career Firefighter and as the Fire Chief of the City of  
25 Oxnard that the proposed NRG P3 facility should not be developed in an area of comparatively  
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27 <sup>1</sup> The one exception is the Declaration of Julie Love Regarding the Presence of Wetlands on the  
28 Puente Project Site (Applicant’s Exhibit No. 1125), which directly rebuts Opening Testimony  
of another party, as discussed further below.

1 higher risk of impediments to first responders when there is an inland location that does not  
2 present these issues.” (emphasis added) (CEC TN #215420, p. 2). It is reasonable to assume  
3 that the Fire Chief is referring to one or both of the alternative sites analyzed in detail in the FSA  
4 since both of these sites were recommended for consideration by the City. (*See*, FSA, p. 4.2-24  
5 for discussion of the alternative sites proposed by the City, including the Ormond Beach Area  
6 Off-Site Alternative and the Del Norte/Fifth Street Off-Site Alternative).

8 The third City employee to offer testimony, Development Services Director Ashley  
9 Golden, also touts inland alternative sites, referring specifically to such sites’ consistency with  
10 applicable land use requirements. She states: “Throughout this proceeding, the City has  
11 encouraged CEC staff to seriously consider alternatives [sic] project sites to avoid  
12 inconsistencies with the City’s land use regulations and adaptation efforts. Despite this, the FSA  
13 rejects numerous inland project sites that would reduce conflicts with the City’s land use plans.”  
14 (emphasis added) (CEC TN #215421, pp. 8-9). Among the numerous inland project sites  
15 recommended by the City and rejected by the FSA, to which Ms. Golden is presumably  
16 referring, are the Ormond Beach Area Off-Site Alternative and the Del Norte/Fifth Street Off-  
17 Site Alternative.

19 Any doubt as to whether or not the City’s Opening Testimony seeks to promote inland  
20 alternative sites, and the Ormond Beach Area Off-Site Alternative in particular, is put to rest by  
21 the City’s witness J. Woodford Hansen, the owner of the company that currently owns the  
22 Ormond Beach Area Off-Site Alternative property. Mr. Hansen testifies that his company “is  
23 open to the sale of all or part of the Property for use as a power plant . . .” (CEC TN #215423, p.  
24 1). By sponsoring this testimony, the City is clearly advancing this site as a feasible alternative  
25 to the Project site, by suggesting that one of the concerns expressed in the FSA with regard to  
26 this alternative – site control, could be resolved.  
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1 Another of the City’s witness, Todd McNamee, Director of Airports for the County of  
2 Ventura, provides testimony promoting the Del Norte/Fifth Street Off-Site Alternative as  
3 superior to the Project site from an aviation safety perspective. Mr. McNamee states: “[t]he Del  
4 Norte/Fifth St Alternative is to the southwest of the Camarillo Airport and does not lie under any  
5 frequently used flight paths or aircraft traffic patterns for that airport.” (CEC TN #215442, p.  
6 2). “It is also my expert opinion as a career aviation executive and as a pilot that the proposed  
7 NRG P3 facility should not be developed in the proposed area of comparatively higher risk when  
8 there is perhaps a better location which poses no aviation hazards.” (emphasis added) (CEC TN  
9 #215442, p. 2).  
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11 Finally, in the most extensive piece of testimony filed by the City, its witness Dr. Revell  
12 devotes 29 pages of detailed analysis to supporting the City’s preference for inland alternative  
13 sites. The final two sentences of his report conclude that “. . . the most effective strategy is to  
14 avoid the hazard in the first place. There are alternative sites to the proposed site that completely  
15 avoid existing and future coastal hazards.” (emphasis added) (CEC TN #215427, p. 29).  
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17 Having devoted the testimony of six of its seven witnesses to promoting inland  
18 alternative sites, including the Ormond Beach Area Off-Site Alternative and the Del Norte Fifth  
19 Street Off-Site Alternatives specifically, as both feasible and environmentally superior to the  
20 proposed Project site, the City cannot now claim that Rebuttal Testimony that goes to those very  
21 issues should be excluded as improper. Furthermore, while rebuttal of the City’s claims  
22 regarding the feasibility and environmental superiority of the alternative sites should not be  
23 restricted to responding to the specific advantages asserted by the City, we note that in at least  
24 some cases the Subject Declarations are specifically focused on the specific advantages asserted  
25 by the City. These include Applicant’s Exhibit No. 1129, which responds specifically to claims  
26 in the Golden testimony regarding “numerous inland project sites that would reduce conflicts  
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1 with the City’s land use plans,” and Applicant’s Exhibit No. 1133, which specifically addresses  
2 hazards to aviation issue raised by Mr. McNamee.

3                   **2.       The Subject Declarations Directly Rebut Opening Testimony of Other**  
4                   **Intervenors In Addition To The City**

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6                   a.       Opening Testimony of CEJA Regarding Environmental Justice  
7                   Applicant’s Exhibit No. 1137 compares CalEnviroScreen 3.0 scores for those census  
8 tracts closest to the proposed Project site with those census tracts closer to the two off-site  
9 alternatives analyzed in detail in the FSA. This analysis responds directly to the analysis  
10 contained in the testimony of California Environmental Justice Alliance witness Strela Cervas.  
11 Describing her analysis, Ms. Cervas states: “I reviewed searches of CalEnviroScreen 3.0’s online  
12 mapping of census tracts within Oxnard and the Moorpark Subarea, in order to determine  
13 assigned combined scores of areas pertinent to this matter, as well as scores for individual  
14 indicators and racial characteristics.” “In particular, because the Energy Commission staff  
15 analysis considered a six mile radius of NRG’s existing Mandalay Generating Station and  
16 proposed site for a new 262 MW natural gas power plant (“the Mandalay Power Plants”), I  
17 reviewed information about census tracts within a six mile radius, and compared that information  
18 to census tracts in the Moorpark sub-area outside a six mile radius of the Mandalay Power  
19 Plants. These findings are discussed below.” (CEC TN #215443, pp. 6-7). Mr. Rubenstein’s  
20 analysis in Applicant’s Exhibit No. 1137 uses this same approach to rebut the suggestion that the  
21 proposed Project site is in close proximity to relatively higher impacted census tracts by  
22 demonstrating that the alternative sites fare worse in such a comparative analysis.

23                   b.       Opening Testimony of EDC Regarding Wetlands

24                   With respect to Applicant’s Exhibit No. 1125, the City contends that it is improper  
25 Rebuttal Testimony because the issues addressed therein were previously raised by the California  
26 Coastal Commission (CCC) and could have been rebutted by Applicant at that time. While this  
27 is true to a degree, and Applicant has in fact previously rebutted the wetland determination of the  
28 CCC, what the City ignores is that Environmental Defense Center witness Laurence E. Hunt,

1 who to Applicant’s knowledge has not previously commented on the Project, builds upon the  
2 wetland determination of the CCC to support a whole series of new claims.

3 Mr. Hunt expresses his concurrence with the CCC determination that 2.03 acres of the  
4 proposed Project site constitute a wetland stating: “[t]he State of California and the CCC require  
5 that only one parameter be present to be classified as a wetland. ‘The [Project] would be  
6 constructed in an area supporting hydrophytic plant species and thus meeting the definition of a  
7 wetland [one parameter criterion] under the Coastal Act and Oxnard LCP.’ (p. 2, CCC 30413(d)  
8 report, dated 7 September 2016 (Ex. 4026)).” (CEC TN #215434, p. 12) He then extrapolates  
9 from that determination to support his claims of additional, different impacts associated with the  
10 Project. Two of the four points made in his “Summary of Testimony,” and three of the four  
11 points made in his “Conclusions,” refer to, and are based upon, the existence of the “2.03-acre  
12 wetland feature.” (CEC TN #215434, p. 4, 17). Given that the CCC wetland determination is  
13 the basis of many of the new claims raised by Mr. Hunt in his Opening Testimony, Applicant’s  
14 rebuttal of that determination is an appropriate subject for Rebuttal Testimony, notwithstanding  
15 the fact that the rebuttal could have been, and in fact was, asserted in another context. It simply  
16 cannot be the case that Applicant must let go unanswered assertions made in interveners’  
17 Opening Testimony simply because the rebuttal to such assertions were, or could have been,  
18 asserted earlier.

19 3. **Rebuttal Testimony Is An Appropriate Mechanism For Responding**  
20 **To Issues Raised In The FSA**

21 As explained above, the Subject Declarations are appropriate Rebuttal Testimony based  
22 on the Opening Testimony from the interveners alone. However, they are also appropriate  
23 Rebuttal Testimony in response to the FSA. The FSA constitutes Staff’s Opening Testimony,  
24 and other parties’ contrary testimony is appropriately characterized as Rebuttal Testimony.  
25 Every party must be free to identify those areas in which it disagrees with the Staff’s analysis  
26 and offer Rebuttal Testimony in response. To suggest that any and all responses to the FSA,  
27 whether they be supportive or contrary, must be included in the Opening Testimony of the other  
28 parties denies those parties the ability to distinguish for the Committee those issues upon which



1 they agree with the Staff, and those issues upon which they disagree. Particularly in a case  
2 where a party (Applicant in this case) generally concurs with the analysis and conclusions in the  
3 FSA, it is important for the Applicant to be able to clearly identify for the Committee those areas  
4 where it disagrees and the basis for that disagreement in the form of Rebuttal Testimony.

5 The Motion points to language from Applicant’s objections to a Staff proposal to extend  
6 the FSA publication deadline past November 18, 2016 as evidence of “NRG’s understanding  
7 that, absent an order stating otherwise, opening testimony should respond to issues in the FSA  
8 and rebuttal testimony would be submitted in response to issues raised in the opening  
9 testimony.” (Motion, p. 2). The quoted language is as follows:

10 [I]f staff finds that it is impossible to complete the additional  
11 analysis [for the FSA], the Committee should direct staff to publish  
12 the FSA as scheduled [on November 18], and to issue an FSA  
13 supplement with any additional analysis on or before December  
14 21, 2016, which is the current deadline for all other parties to file  
15 opening testimony. The parties would have ample opportunity to  
16 review, and, if necessary, respond to the new analysis in their  
17 rebuttal testimony.

18 This language confirms that NRG’s understanding was, and is, just the opposite of what the  
19 Motion suggests. The point of the quoted language was that, as Staff’s Opening Testimony, the  
20 FSA (or portions thereof) could be issued on the same date as other parties’ Opening Testimony  
21 and responded to by other parties in their Rebuttal Testimony. As indicated by the language  
22 quoted above, Applicant and its counsel have consistently understood the FSA to be Staff’s  
23 Opening Testimony, as distinct from Staff’s Rebuttal Testimony, which it filed on January 24,  
24 2017 in this case at the same time as the other Parties. We note that none of the parties objected  
25 at the time to Applicant equating the FSA to the Opening Testimony of the other parties.

26 Staff’s detailed assessment of the Ormond Beach Area Off-Site Alternative and the Del  
27 Norte/Fifth Street Off-Site Alternative, including its conclusion that the Ormond Beach Area  
28 Off-Site Alternative was environmentally superior to the proposed Project site, was first  
presented in the FSA. Applicant sought to rebut certain aspects of that analysis, and  
appropriately included its contrary views in its Rebuttal Testimony. As stated above, however,  
if Applicant is incorrect in its understanding, or if this is an issue that the Committee elects not to

1 resolve in the context of this specific proceeding, the interveners' Opening Testimony alone  
2 make the Subject Declarations appropriate Rebuttal Testimony.

3                   4.       **The Other Parties Are Not Prejudiced By The Inability To File**  
4                                   **Surrebutal To Applicant's Rebuttal Testimony**

5                   The Subject Declarations do not contain complex subjective analysis. For the most part,  
6 they are simple compilations of information gleaned from well-known and generally accepted  
7 public databases accessible by all of the parties. It is the type of factual information that in  
8 many cases would be appropriate for the Committee to take official notice of. Thus, it is not  
9 clear what type of "contrary testimony" the interveners might seek to introduce, or how they are  
10 prejudiced by the inability to do so, as suggested in the Motion. The Motion refers to  
11 Applicant's Exhibit No. 1123 as an example of how the City is prejudiced by not having an  
12 "opportunity to develop and offer contrary testimony." This particular declaration contains  
13 factual information related to recorded cultural resources obtained from reliable databases  
14 routinely relied upon by parties in CEC proceedings. What contrary testimony would the  
15 interveners seek to introduce if provided the opportunity to do so? That the information in the  
16 database is inaccurate? While the indisputable facts contained in the Subject Declarations may  
17 not support the interveners' positions, that is not the sort of "prejudice" that would justify  
18 preventing this important information from being considered by the Committee.

19                   **C. Conclusion**

20                   For all of the reasons set forth above, the Subject Declarations are appropriate Rebuttal  
21 Testimony, and provide information useful to the Committee in its evaluation of the Project and  
22 alternatives thereto that have been advanced by others, including most notably the City. The  
23 Motion seeks through procedural maneuvering to deny the Committee access to this timely and  
24 relevant information and should be denied.

25 DATED: January 31, 2017

Respectfully submitted,

26                   /s/ Michael J. Carroll

27                   \_\_\_\_\_  
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