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<b>Project Title:</b>	Puente Power Project
<b>TN #:</b>	217737
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<b>Organization:</b>	Center for Biological Diversity
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**STATE OF CALIFORNIA**

**Energy Resources Conservation and Development Commission**

In the Matter of:

APPLICATION FOR CERTIFICATION  
OF THE PUENTE POWER PROJECT

DOCKET NO. 15-AFC-01

Opposition to Applicant's Motion to  
Exclude Supplemental Testimony

**CENTER FOR BIOLOGICAL DIVERSITY, ENVIRONMENTAL DEFENSE CENTER, AND  
SIERRA CLUB'S OPPOSITION TO APPLICANT'S MOTION TO EXCLUDE FROM THE  
EVIDENTIARY RECORD THE SUPPLEMENTAL TESTIMONY OF JAMES H.  
CALDWELL**

May 25, 2017

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Intervenors Center for Biological Diversity (the "Center"), Environmental Defense Center ("EDC"), and Sierra Club submit the following Opposition to Applicant's Motion to Exclude from the Evidentiary Record the Supplemental Testimony of James H. Caldwell (TN #: 217565).

Pursuant to the Commission's Rules of Practice and Procedure, evidence relevant to proceedings is broadly admissible:

(b) Record.

(1) The "hearing record", in an adjudicatory proceeding, is all of the information the commission may consider in reaching a decision. The hearing record shall contain:

(A) all documents, filed comments, materials, oral statements, or testimony received into evidence by the committee or commission at a hearing;

(B) public comment offered at a hearing;

(C) any materials or facts officially noticed; and

(D) for siting cases, subject to 1212(b)(3), staff's Final Staff Assessment and any timely filed supplemental assessments.

(2) Parties may move to exclude information from consideration by the commission on the ground that it is not relevant, is duplicative of information already in the record, or on another basis. If the presiding member grants such a motion, the information shall be excluded from the hearing record. While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency, and adequacy of the record.

(3) In a siting case, if a party requests a staff witness be present to sponsor specific portions of the Final Staff Assessment, or any supplemental assessments, and no witness is made available for questioning, the relevant portions of the staff assessment or supplemental assessments at issue shall be treated as comment and shall not be sufficient, in and of itself, to support a finding by the commission.

(c) Basis for and Contents of Decisions.

1) Decisions in adjudicative proceedings shall be based on the evidence in the hearing record, explain the basis for the decision, and shall include but need not be limited to all legally-required findings of fact and conclusions of law.

2) A finding may be based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to relying on in the conduct of serious affairs. Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions. The committee or commission may rely on public comment, standing alone, to support a finding if the committee or commission provides notice of its intent to rely upon such comment at the time the comment is presented, other parties are provided an opportunity to question the commenter, and parties are given a reasonable opportunity, as ordered by the presiding member, to provide rebuttal evidence. The committee or commission shall give appropriate weight to information in the record as allowed by law.

3) 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.

20 C.C.R. § 1212 (as amended 2016).

The Supplemental Testimony submitted by the City of Oxnard clearly meets the criteria to be admissible as part of the record in this ongoing proceeding. *Id.* Nonetheless, the applicant seeks to exclude this relevant, non-duplicative testimony. The Applicant’s motion to exclude this relevant testimony is focused on its own interpretation of which “parts” of the evidentiary record are currently “closed” and which remain “open” at this stage in the proceedings. The March 10, 2017 Committee Orders for Additional Evidence and Briefing Following Evidentiary Hearings (TN #216505) and the May 11, 2015 Revised Committee Scheduling order (TN #217550) make it clear that the Committee has found that several key issues have not been fully explored and will be considered in additional evidentiary hearings now scheduled for late-July. The Order for Additional Evidence requires the applicant and staff to submit additional evidence and invites intervenors to do so on 8 topic areas ranging from biological resources, to alternatives to compliance and closure. While the Order seeks information on specific “subtopics” several of those “subtopics” in turn affect the larger topic area; for example, the results of new surveys may require additional testimony and analysis to put those survey results in context. Similarly, as to alternatives, the order required staff and invited other parties to:

6. Analyze the use of one or more smaller (50 – 100 MW) turbines instead of the larger turbine proposed by the applicant at the two alternative sites analyzed in the Final Staff Assessment, the Del Norte/Fifth Street Off-site Alternative and the Ormond Beach Area

Off-site Alternative, to determine whether it is feasible to reduce or eliminate the previously identified potential impacts on aviation.

If the use of one or more smaller turbines at those alternatives sites would also reduce or eliminate other impacts of the project, then that is a relevant issue that should also be addressed by staff and the other parties. That is what the supplemental testimony does.

Although the Committee's request for additional evidence was specific for each of the 8 topic areas/subtopics, where new analysis or new information was required, it is should not be surprising that broader issues related to those topics will need to be revisited as well. The CEQA analysis cannot be undertaken in isolation for each "topic" or "subtopic" but must take into account all of the relevant information available. Even if the topic area could be only partially reopened, the Committee order expressly asks staff to analyze and make a determination whether it is feasible to use smaller turbines in off-site alternatives to reduce one impact. The order clearly asks for an additional analysis of feasibility, which is related to fulfilling the project objectives which is not limited to the applicant's proposal. Moreover, whether those alternatives could also reduce other impacts is also relevant to the analysis and determination of feasibility. These issues are addressed in the Supplemental testimony. Additional testimony on the question of feasibility of these and related alternatives is clearly relevant to the subtopic the Committee order addressed. Therefore, the Supplemental Testimony which includes other relevant information related to the feasibility of alternatives that would include smaller turbines is properly submitted at this time.

The Applicant's attempt to use the narrow scope of the Committee's order to prohibit relevant evidence from being submitted would undermine the process and elevate form over substance and lead to absurd results. For example, the Committee order required only additional biological surveys—it did not expressly mention any analysis or testimony associated with those surveys. Using the Applicant's logic, this would mean that the results could be submitted in a vacuum without any analysis by staff or any opportunity for cross-examination or rebuttal testimony. To read the Committee order as excluding analysis and testimony regarding additional biological surveys would be nonsensical. Just as it is clear that the results of the biological surveys may require additional analysis

as well as new testimony, although that was not expressly called for in the Committee's order, so too, the Committee's request for additional analysis regarding the feasibility of the use of smaller turbines in the off-site alternatives to reduce or eliminate one impact (to aviation) may require additional analysis of feasibility as provided in the Supplemental Testimony or regarding how such alternatives could reduce or eliminate other impacts.

There can be no prejudice to the Applicant from letting the process proceed at this time because the Applicant has an opportunity to respond to that testimony in writing and to cross examine the witness at the next hearing, and to raise objections at hearing. The Applicant's motion is not well taken as it seeks to exclude relevant testimony that responds to the Committee's Order for Additional Evidence and which meets the requirements for being admitted as part of the hearing record.

The Center, EDC, and Sierra Club oppose the Applicant's motion to exclude this relevant testimony and urge the Committee to deny the motion.

Dated: May 25, 2017

Respectfully submitted,

/s/ Lisa T. Belenky

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