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Project Title:	Puente Power Project
TN #:	220357
Document Title:	Applicant's Motion to Strike Interveners' Proposed Exhibit No. 4039
Description:	Interveners Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County and Environmental Defense Center
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8 State of California
9 Energy Resources
10 Conservation and Development Commission

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

Docket No. 15-AFC-01

14 APPLICANT'S MOTION TO STRIKE
15 INTERVENERS SIERRA CLUB LOS PADRES
16 CHAPTER, ENVIRONMENTAL COALITION
17 OF VENTURA COUNTY AND
18 ENVIRONMENTAL DEFENSE CENTER
19 PROPOSED EXHIBIT NO. 4039

20 Pursuant to Title 20, California Code of Regulations ("CCR") § 1211.5(a) and
21 § 1212(b)(2), Applicant hereby requests that the Committee exercise its authority under Title 20,
22 CCR § 1203(c) to exclude from the evidentiary record interveners Sierra Club Los Padres
23 Chapter, Environmental Coalition of Ventura County and Environmental Defense Center
24 proposed Exhibit No. 4039 "Intervenors' Submission of Evidence of Rare species Findings at
25 Puente Project Site" (TN #217571) on the bases that: i) the proposed evidence is outside the
26 scope of the upcoming evidentiary hearings; and ii) the interveners do not intend to make the
27 declarant responsible for the proposed exhibit available for questioning during the evidentiary
28 hearings.

1 A. ***The Scope of the Upcoming Evidentiary Hearings is Strictly Limited and***
2 ***Proposed Exhibit No. 4039 Falls Outside that Scope***

3 The Committee has been very clear that the scope of the upcoming evidentiary hearings,
4 including the permissible scope of any additional testimony or documentary evidence, is limited
5 to the subtopics specifically identified in the March 10, 2017 “Committee Orders for Additional
6 Evidence and Briefing Following Evidentiary Hearings” (TN #216505) (the “March 10 Orders”).
7 As stated by the Committee in its June 9, 2017 “Committee Ruling on Motion to Exclude
8 Caldwell Testimony and Acceptance of ISO Special Study Offer” (the “June 9 Order”):

9 *At the conclusion of the Evidentiary Hearings in February, the*
10 *Committee closed the record on all topics [citing to February 10,*
11 *2017 Transcript, TN #216594, p. 375, lines 9 – 25]. By requesting*
12 *additional evidence of a limited scope in its March 10 Orders, the*
 Committee reopened the record only to receive the additional
 evidence it requested. It was not an invitation to submit additional
 *evidence on unrelated topics.*¹

13 Furthermore, in its May 11, 2017 “Revised Committee Scheduling Order” (TN #217550)
14 (the “May 11 Order”), and the June 9 Order, the Committee made clear that in order for
15 additional evidence to be admissible, it must be directly responsive to the specific subtopics
16 identified in the March 10 Orders, and not merely tangentially related. In its May 11 Order, the
17 Committee stated “[a]s to each of those topics [identified in the March 10 Orders], the
18 Committee’s request for additional evidence was limited to specific subtopics.”² The Committee
19 applied this strict standard to deny admission of testimony offered by the City on the topic of
20 “Alternatives” that pertained to alternatives to the proposed Project, but was not within the scope
21 of the identified subtopic of the “effects of smaller turbine(s) on aviation at alternative sites.”³

22 With respect to the topic of Biological Resources, the Committee requested the following
23 additional evidence:

24 *Applicant shall provide results from one or more focused*
25 *biological surveys of the proposed project site. These focused*
 surveys shall be conducted during the period beginning with the

26 ¹ TN #218016, p. 5.

27 ² TN #217550, p. 2, footnote 4.

28 ³ TN #218016, p. 6.

1 issuance of this order and ending July 31, 2017, at time(s) within
2 that period that are appropriate for detecting the identified
3 species. If the appropriate time for detecting the species would
4 normally be after July 2017, the survey will nonetheless be
5 conducted during the above-specified period, modified as
6 necessary to account for observable information available during
7 that period. Applicant shall file a survey plan for party and public
8 comment and invite and allow for the participation of the Energy
9 Commission Staff, the California Coastal Commission, and the
10 California Department of Fish and Wildlife in the design and
11 conduct of these surveys. The public and party comment period
12 shall be no less than seven days. Applicant may proceed
13 immediately with any survey for which the most appropriate survey
14 period may pass before completion of agency consultations and
15 public and party comment on its survey plan. These surveys shall
16 determine the likelihood for the presence of the following species:

17 a. Ventura marsh milk vetch (*Astragalus pycnostachyus* var.
18 *lanosissimus*);

19 b. Globose dune beetle (*Coelus globosus*);

20 c. Two-striped garter snake (*Thamnophis hammondi*);

21 d. California legless lizard (genus *Anniella*); and

22 e. Blainville's horned lizard (*Phrynosoma blainvillii*) (emphasis
23 added).⁴

24
25 The March 10 Orders specifically limited additional evidence on the topic of Biological
26 Resources to the results of biological resources surveys conducted on the Project Site. Proposed
27 Exhibit No. 4039 seeks to introduce evidence pertaining to the detection of the silvery legless
28 lizard not only outside the Project Site, but outside the broader Mandalay Generating Station
Property of which the Project Site is a part. The proposed exhibit is, therefore, clearly outside
the scope of the March 10 Orders and must be excluded on that basis.⁵

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⁴ TN #216505, pp. 1-2

⁵ Testimony offered by interveners experts illustrate a good degree of confusion regarding what constitutes the "Project Site," which was very clearly defined in Applicant's Biological Resources Survey Methodology, but not even they have suggested that the detection of silvery legless lizards described in Exhibit 4039 occurred within the Project Site.

1 ***B. The Interveners have Declined to Make the Declarant of the Supporting the***
2 ***Proposed Exhibit Available for Cross-Examination***

3 Parties are entitled to question the sponsors of proposed exhibits offered into evidence by
4 other Parties. Proposed Exhibit No. 4039 is supported by a sworn declaration provided by Mr.
5 Brian G. Trautwein, of Environmental Defense Center. Yet, interveners have not identified Mr.
6 Trautwein as a witness at the evidentiary hearings. Questions that Applicant would like to ask
7 Mr. Trautwein if he had been made available include critical issues pertaining to proposed
8 Exhibit No. 4039, including, but not necessarily limited to, the following:

- 9 • Mr. Trautwein’s qualifications to conduct biological resources surveys;
- 10 • the survey methodology employed by Mr. Trautwein, including the depth and duration of
11 any raking surveys;
- 12 • the precise location of Mr. Trautwein’s detection of silvery legless lizards; and
- 13 • steps taken to obtain expedited inclusion of the related Occurrence Report in California
14 Natural Diversity Database (CNDB) by California Department of Fish and Wildlife.
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17 Without the ability to question Mr. Trautwein, Applicant is not able to fully evaluate the
18 information and analysis contained in the proposed exhibit, including its significance or
19 implications, if any with respect to the Project. Applicant is also denied the opportunity to elicit
20 additional information pertaining to the subject matter of the proposed exhibit which might
21 provide additional insights or context for the information that is provided. Applicant notes that
22 in the Prehearing Statement filed by interveners Sierra Club Los Padres Chapter, Environmental
23 Coalition of Ventura County and Environmental Defense Center (TN #220306), they have
24 reserved a full 45 minutes to question Applicant’s biological resources experts regarding some of
25 the very same issued identified above. Furthermore, the Supplemental Testimony of Lawrence
26 H. Hunt (TN #215434) contains a detailed critique of the survey methodology implemented by
27 Applicant’s biological resources experts. It is only appropriate that Applicant be provided the
28 opportunity to explore the same issued with interveners’ declarant. In the absence Mr. Trautwein

1 being available for questioning at the evidentiary hearings, it would be highly prejudicial to
2 Applicant to allow proposed Exhibit No. 4039 into the record.

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4 DATED: July 25, 2017

Respectfully submitted,

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/s/ Michael J. Carroll

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Michael J. Carroll
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