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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

**MOTION TO STRIKE TESTIMONY OF DAWN GLEITER AND PORTIONS OF THE  
TESTIMONY OF RANBIR SEKHON**

September 15, 2017

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## **Motion to Strike Testimony of Dawn Gleiter and Portions of Testimony of Ranbir Sekhon**

Intervenor Center for Biological Diversity (“Center”) hereby formally renews its objections to, and moves to strike, the following testimony offered at the September 14, 2017 evidentiary hearing in this matter: (1) the oral testimony of Dawn Gleiter; and (2) the portions of the oral testimony of Ranbir Sekhon addressing issues outside the scope of the Moorpark Sub-Area Local Capacity Alternative Study (TN # 220813) (hereafter “CAISO Study”) and/or outside the scope of issues Southern California Edison’s (“SCE’s”) counsel indicated SCE’s witnesses were prepared to address.<sup>1</sup>

The Center requests that the Committee issue a written order on this motion pursuant to title 20, section 1215(a), of the California Code of Regulations. As discussed further below, moreover, should the Committee conclude that any objection raised at the evidentiary hearing to Ms. Gleiter’s or Mr. Sekhon’s testimony was ruled upon or otherwise resolved at the evidentiary hearing, the Center requests that the Committee reissue any such ruling in the form of a written order.<sup>2</sup>

Intervenors City of Oxnard, Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County, Environmental Defense Center, FFIERCE, and California Environmental Justice Alliance have reviewed this motion and have authorized counsel for the Center to represent that they join in requesting the relief sought herein.

### **I. The Testimony of Dawn Gleiter and Portions of the Testimony of Ranbir Sekhon Should Be Stricken.**

The presiding member has authority to control evidentiary hearings in siting proceedings. (Cal. Code Regs., tit. 20, § 1203(c).) That authority, however, must be exercised in accordance with basic principles of due process and fairness to the parties. (See *id.*, § 1210 [requiring adherence to the Administrative Adjudication Bill of Rights, set forth in Government Code section 11425.10, in

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<sup>1</sup> Neither the Center nor any other party joining in the relief requested in this motion waives any other objection to the admissibility of, or weight to be accorded, any testimony that may be accepted into the record of this proceeding, including but not limited to objections based on hearsay, lack of foundation, speculation, or unsupported opinion.

<sup>2</sup> The request for a written order regarding rulings made at the evidentiary hearing is timely filed within five calendar days of any such ruling. (Cal. Code Regs., tit. 20, § 1215(a) [“During proceedings before a committee, a party may request that a ruling of the committee or presiding member be issued in the form of a written order. Any such request shall be made no later than five calendar days following the ruling.”].)

adjudicatory proceedings].) Specifically, questions involving “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.” (Cal. Code Regs., tit. 20, § 1212(b)(2).) Admitting the testimony of Dawn Gleiter, and portions of the testimony of Ranbir Sekhon, offered at the September 14, 2017 evidentiary hearing would contravene these principles.

**A. Dawn Gleiter’s Testimony Should Be Stricken in its Entirety.**

The Applicant’s decision to offer Dawn Gleiter’s testimony solely in oral form at the hearing was improper, contrary to the Committee’s orders, and prejudicial to all other parties. The Committee’s June 20, 2017 Order was absolutely clear: “Testimony responding to the study is due on August 30, 2017.”<sup>3</sup> The June 20 Order did not state (as Applicant argued at the hearing) that only written testimony was due on August 30. Rather, the Order clearly stated that *all* responsive testimony was due on August 30. All other parties to this proceeding complied with the Committee’s Order by filing written testimony by August 30. Only the Applicant chose to disregard the Committee’s Order. Moreover, the Applicant apparently did so willfully; counsel plainly admitted at the hearing that the Applicant never had any intention of filing Ms. Gleiter’s testimony in written form. When questioned as to why she did not file written testimony, Ms. Gleiter explained that she was “on vacation in France” when written testimony was due. Yet the August 30 deadline was imposed by the Committee on June 20, which presumably provided NRG and its counsel with plenty of time to plan around Ms. Gleiter’s vacation. In any event, neither Ms. Gleiter nor the Applicant’s counsel attempted to explain why a company as large as NRG, with the assistance of one of the world’s biggest law firms, could not have found someone else to sponsor written testimony in light of Ms. Gleiter’s vacation plans. Ms. Gleiter’s oral testimony responding to the CAISO Study at the September 14, 2017 evidentiary hearing was untimely, and the Applicant has not identified any reason why the Committee should consider it.

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<sup>3</sup> June 20, 2017 Committee Orders (TN # 219815) at 3.

The Applicant itself stressed the importance of the August 30 deadline in motions to strike exhibits filed by other intervenors on September 7.<sup>4</sup> In those motions, the Applicant complained that the filing of exhibits a week before the evidentiary hearing was “prejudicial to the other parties” because of the short time available for review of exhibits and preparation of responses.<sup>5</sup> Yet the Applicant willfully chose to offer *substantive testimony* responding to the CAISO Study in oral form at the hearing itself, when it knew other parties would have no opportunity at all to review that testimony or prepare responses to it. The Applicant’s double standard is glaring, and suggestive of bad faith.

It would be highly prejudicial and unfair for this Committee to allow the Applicant to play by two sets of rules, to seek strategic advantage by sandbagging other parties with undisclosed testimony, and to attempt to pack the record with evidence other parties cannot effectively rebut. In deciding whether to admit Ms. Gleiter’s testimony, the presiding member must consider both “fairness to the parties” and “adequacy of the record.” (Cal. Code Regs., tit. 20, § 1212(b)(2).) Moreover, “each party shall have the right . . . to rebut evidence” offered in siting proceedings. (*Id.*, § 1212(a), italics added; see also *id.*, § 1210, citing Gov. Code § 11425.10 [administrative adjudication “bill of rights” providing that persons subject to administrative adjudicatory proceedings must have “the opportunity to present and rebut evidence”].) The Applicant’s willful conduct deprived other parties of their right to a fair hearing and their right to rebut Ms. Gleiter’s testimony. Her testimony should be stricken in its entirety.

The Center recognizes that parties raised objections to Ms. Gleiter’s testimony at the hearing. Because the hearing transcript is not yet available, the Center cannot say for sure whether the Committee explicitly ruled on those objections, or what the basis for any such rulings might have been. To the extent the Committee denied those objections, the Center asks that the Committee reconsider in light of the argument offered in this motion. If the Committee does not reconsider any prior rulings it

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<sup>4</sup> See Applicant’s Motion to Strike Proposed Exhibits of Intervenors Sierra Club, et al. (TN # 221104) at 1-2; Applicant’s Motion to Strike Proposed Exhibits of Intervener Center for Biological Diversity, etc., (TN # 221105) at 1-2.

<sup>5</sup> Applicant’s Motion to Strike Proposed Exhibits of Intervenors Sierra Club, et al. (TN # 221104) at 2; Applicant’s Motion to Strike Proposed Exhibits of Intervener Center for Biological Diversity, etc., (TN # 221105) at 2.

may have made denying those objections, the Center formally requests that those rulings be memorialized in a written order or orders pursuant to title 20, section 1215(a), of the California Code of Regulations.

**B. Portions of the Testimony of Ranbir Sekhon Should Be Stricken.**

Portions of the testimony of SCE's witness, Ranbir Sekhon, should be stricken as well because the parties did not have a fair opportunity for rebuttal.

As the Committee is aware, the Center and other intervenors raised concerns about SCE's testimony during the September 12, 2017 Committee Conference. Specifically, no party filed or otherwise indicated their intent to offer testimony prepared by SCE witnesses; rather, the Hearing Officer invited SCE to present witnesses less than a week before the evidentiary hearing.<sup>6</sup> During the Committee Conference, the Center and other intervenors reserved the right to object to any testimony offered by SCE's witnesses.

The Center formally renews its objection to portions of Mr. Sekhon's testimony for several reasons. First, Mr. Sekhon's testimony offered after the lunch break addressed issues outside the scope of the CAISO Study. For example, Mr. Sekhon addressed a range of issues—including the need for and timing of potential RFOs for preferred resources, interconnection issues, and process issues related to Public Utilities Commission approval of RFOs and resource adequacy contracts—that the CAISO Study did not consider. Second, at the beginning of the evidentiary hearing SCE's counsel stated that SCE's witnesses were prepared to discuss only specific issues and asked the parties to respect the scope of those issues. SCE's first witness, Garry Chinn, described those issues as limited to (1) the load forecast used in the CAISO Study; (2) historical load shapes for substations in the Moorpark subarea; and (3) historical information regarding SCE's procurement of distributed energy resources in other areas.<sup>7</sup> Issues addressed by Mr. Sekhon in his testimony after the lunch break appeared to go well beyond the scope of issues described by SCE's counsel and Mr. Chinn.

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<sup>6</sup> Hearing Officer email to Tristan Reyes Close re SCE participation in hearing on CAISO Study (TN # 221108) (docketed Sept. 11, 2017).

<sup>7</sup> Because a transcript of the hearing is not yet available, the Center is relying on the recollection and contemporaneous notes of counsel in describing the scope of issues identified by Mr. Chinn.

Third, and most importantly, accepting Mr. Sekhon's testimony into the record would be prejudicial and unfair to the parties. Mr. Sekhon covered a wide range of issues in very rapid succession. The parties had inadequate notice that SCE's witnesses would be addressing these issues, no opportunity to prepare any testimony of their own, and no opportunity for adequate rebuttal. Accordingly, this portion of Mr. Sekhon's testimony should be stricken. (See Cal. Code Regs., tit. 20, §§ 1210, 1212(a), (b)(2).)

Again, the Center recognizes that parties raised objections to Mr. Sekhon's testimony at the evidentiary hearing. Because the hearing transcript is not yet available, the Center cannot say for sure whether the Committee explicitly ruled on any or all of those objections, or what the basis for any such rulings might have been. To the extent the Committee denied those objections, the Center asks that the Committee reconsider in light of the argument offered in this motion. If the Committee does not reconsider any rulings it may have made at the evidentiary hearing denying those objections, the Center formally requests that those rulings be memorialized in a written order or orders pursuant to title 20, section 1215(a), of the California Code of Regulations.

## **II. Conclusion**

For the foregoing reasons, the Center and the other parties joining this motion respectfully request that the testimony of Dawn Gleiter, and the portions of the testimony of Ranbir Sekhon discussed above, be stricken from the record.

Dated: September 15, 2017

Respectfully submitted,

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