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STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: APPLICATION FOR CERTIFICATION FOR THE PUENTE POWER PROJECT	)))))))	Docket No. 15-AFC-01 APPLICANT'S RESPONSE TO MOTION TO STRIKE TESTIMONY OF DAWN GLEITER AND PORTIONS OF TESTIMONY OF RANBIR SEKHON

Applicant hereby responds to the "Motion to Strike Testimony of Dawn Gleiter and Portions of Testimony of Ranbir Sekhon" filed by intervenor Center for Biological Diversity and joined by other specified intervenors to these proceedings (collectively, the "Intervenors") (TN #221191) ("Motion to Strike").

The Motion to Strike seeks to "renew" or have the Committee "reconsider" certain motions and objections made by the Intervenors pertaining to the oral testimony of witnesses provided during the evidentiary hearing on September 14, 2017. (Motion to Strike at 1, 3.) In the alternative, the Motion to Strike requests that rulings of the Committee on the motions and objections of Intervenors made during the evidentiary hearing be issued in the form of a written order pursuant to California Code of Regulation, Title 20 ("Cal. Code Regs., tit. 20"), § 1215(a) (Motion to Strike at 1).

The specific testimony that is the subject of the Motion to Strike is: (1) the entirety of the oral testimony provided by Applicant's witness Dawn Gleiter on the basis that Ms. Gleiter was required to file prepared written testimony as a prerequisite to providing oral testimony at the hearing; and (2) portions of the oral testimony of Southern California Edison's ("SCE") witness Ranbir Sekhon on the basis that it was outside the scope of the Moorpark Sub-Area Local Capacity Alternative Study (TN # 220813) (the "CAISO Special Study") and/or outside the scope of issues SCE's counsel indicated SCE's witnesses were prepared to address during the hearing.

As explained below, the only request that Intervenors may properly put before the Committee at this time is a request that the presiding member issue a written order reflecting the rulings made at the hearing in response to the requests made at the hearing. There is no mechanism for Interveners to "renew" the motions and objections, or ask the Committee to "reconsider" its ruling thereon, as Intervenors attempt to do in the Motion to Strike. As a

corollary, it is not appropriate to re-argue the merits of the requests, or the rulings thereon, at this time. Argument was taken at the evidentiary hearing, and the requests were either affirmatively denied by the Hearing Officer, or deemed denied by his failure to rule. The only opportunity Intervenors have to re-argue the merits is via a properly filed petition to the full Commission.

1. <u>Intervenors' attempts to "renew" or request that the Committee "reconsider" the motions and objections made during the hearing is improper as a procedural matter.</u>

Intervenors' oral motion to strike portions of Mr. Sekhon's testimony, and objections to the testimony of Ms. Gleiter, made during the hearing were ruled upon by the Hearing Officer during the hearing pursuant to authority granted by the presiding member. (Cal. Code Regs., tit. 20, § 1205.) As pointed out in the Motion to Strike, the presiding member of the Committee has authority to control evidentiary hearings in siting proceedings. (Cal. Code Regs., tit. 20, § 1203(c).) Specifically, the presiding member may regulate the making of "oral comments or testimony," and 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, §§ 1203(c) and 1212(b)(2).) The Hearing Officer acted within the scope of his authority in ruling on the requests of the Intervenors, and the Motion to Strike does not assert otherwise.

The applicable regulations to do not provide for any mechanism to "renew" or seek "reconsideration" of requests made and properly ruled upon during the course of a hearing. Furthermore, to the extent that the current absence of a transcript results in any ambiguity as to whether or not the requests of the Intervenors were ruled upon during the hearing, if requests for action made orally during a hearing are not ruled upon by the end of the hearing, the request is deemed denied. (Cal. Code Regs., tit. 20, § 1211.5(b).) Thus, even if the Hearing Officer had not issued rulings on the requests of the Intervenors, which he did, they would be deemed denied at this point.

The proper course of action for seeking review of the Hearing Officer's determinations is to request a written order regarding rulings made at the hearing, as the Intervenors have done in the Motion to Strike (Motion to Strike at 1, 4), and to petition the full Commission to review the written order. (Cal. Code Regs., tit. 20, § 1215(a) and (b).) Intervenors also request that the Committee issue a written order in response to the Motion to Strike (Motion to Strike at 1), and there was some discussion during the Committee Conference held on September 18, 2017 as to whether or not there was any material difference between the motions and objections as made orally at the hearing, and the motions and objections as set forth in writing in the Motion to Strike. While the substance of the requests appears to be essentially the same, the arguments in support of the requests are more fully developed in the Motion to Strike than they were during the hearing. Furthermore, regardless of whether or not there is any material difference between the requests made at the hearing and the requests made in the Motion to Strike, Cal. Code Regs., tit. 20, § 1215(a) specifically authorizes parties to request written orders reflecting rulings *made at the hearing*, based on requests *made at the hearing*, and any order issued by the Committee must be within the scope of the applicable regulation.

2. <u>The rulings of the Hearing Officer made during the hearing on September 14, 2017 were proper.</u>

Because there is no mechanism for renewing the requests made at the hearing before the Committee or asking the Committee to reconsider its ruling thereon, it is too late to argue the merits to the Committee, and premature to argue the merits to the full Commission since no petition for review of the presiding member's rulings has been filed. Nevertheless, without waiving its rights to respond to any petition that might be filed with the full Commission, Applicant summarizes below its responses to the substantive arguments of the Intervenors.

a. It was proper for Ms. Gleiter to be permitted to provide oral testimony during the hearing without having previously filed written testimony.

Testimony in site certification proceedings may be provided in either written or oral form, and there is no requirement that oral testimony be preceded by the filing of written testimony. (See, Cal. Code Regs, tit. 20, §§ 1201(w) (defining "Testimony" as "any oral or written statement made under oath").) The "Notice of Evidentiary Hearing and Committee Conferences, Order for Prehearing Filing of Evidentiary Objections and Motions, etc." (TN #220900) ("Hearing Notice and Order") clearly provides for both written and oral testimony **or** one without the other. The Hearing Notice and Order states that, among other things, Prehearing Statements from the parties must specify:

> The identity of each witness the party intends to sponsor at the Evidentiary Hearing, the subject area(s) about which the witness(es) will offer testimony, **whether the testimony will be oral or in writing**, a brief summary of the testimony to be offered by the witness(es), qualifications of each witness, the time required to present testimony by each witness, and whether the witness seeks to testify telephonically; (emphasis added)

According to Intervenors' theory, for which they provide no support, all witnesses are required to provide written testimony and are precluded from going beyond a mere restatement of that written testimony during the evidentiary hearings, including presumably in response to questions from the Committee or other parties. Intervenors articulate no basis for distinguishing between oral testimony provided in the absence of previously filed written testimony, and oral testimony that might go beyond the scope of any previously filed written testimony. There have been many examples over the course of these proceedings where witnesses have expanded upon their written testimony during the course of their oral testimony, including use of documents to "facilitate" the presentation of oral testimony that were not included with the witness' written testimony. (See, e.g., Presentation of Testimony on CAISO Analysis of Puente Preferred Resources Alternative, TN #221155.)

Oral testimony that goes beyond the scope of previously filed written testimony is particularly prevalent in proceedings where "informal" hearing procedures are followed, as was the case during the hearing on September 14, 2017. The informal hearing procedures are intended to facilitate the free exchange of information through "roundtable" style discussion that

is specifically intended to elicit relevant information beyond that provided in prepared written testimony. According to Intervenors' theory, any such information is subject to being stricken from the record.

Furthermore, Applicant identified its intention to have Ms. Gleiter provide oral testimony without the filing of written testimony in its Prehearing Statement filed on September 7, 2017. The Hearing Notice and Order provides as follows:

> All parties are **ORDERED** to file any objections or other motions regarding the proposed evidence, testimony, and exhibits of another party **no later than 5:00 p.m. on Friday, September 8, 2017**. Such objections and motions will be considered during the September 12, 2017 Committee Conference. Absent a showing of good cause for filing or making an objection or motion after the above deadline, objections and motions will not be considered following the September 12 Committee Conference or during the September 14 Evidentiary Hearing. (emphasis in original).

Intervenors made no objections to the oral testimony of Ms. Gleiter prior to the September 8 deadline, even though they were well aware that Ms. Gleiter had not filed any written testimony and was intending to provide oral testimony at the hearing. Having failed to raise a timely objection, Intervenors cannot be permitted to raise an objection at the very moment that the witness is called to the stand to testify.

Thus, applicable regulations, and the orders issued by the Committee in these proceedings, clearly allow written and/or oral testimony, and the former is not a prerequisite for offering the latter. Furthermore, to the extent Intervenors had any valid objection to the admission of Ms. Gleiter's testimony, they waived it by failing to raise it on a timely basis despite being well aware of Applicant's intention to offer oral testimony only.

b. **The testimony of Mr. Sekhon was within the scope of the hearing, addressed issues specifically put into play by Intervenors' witnesses in their written and oral testimony, and within the scope indicated by SCE's counsel.**

Intervenors object to testimony provided by Mr. Sekhon ". . . 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 . . ." (See, Motion to Strike at 4.) Intervenors' objections are curious since it was Intervenors who put the issue of a preferred resources "request for offers" or "RFO" into play in the first place. Numerous witnesses sponsored by Intervenors advocated for one or more RFOs for the purpose of identifying available resources and other pertinent information such as costs. (See, e.g., "James H. Caldwell Testimony in Response to CAISO Report" (TN #220974) at 2 ("the only logical and legal course for the CEC is to reject the Puente AFC pending CPUC authorization to Southern California Edison to conduct a series of preferred resource RFOs to mitigate the Local Capacity deficit when Mandalay and Ormond Beach retire in December 2020.").)

Intervenors sponsored two witnesses the primary purpose of which appeared to be to discuss their prior experience with preferred resources RFOs and the ease with which they believe preferred resources could be procured through such an RFO for the Moorpark Sub-Area. (See, "Matt Owens Testimony re CAISO Study" (TN #220975) and Damon Franz Testimony re CAISO Study (TN #220976). . Having opened the door on these issues, and provided extensive testimony thereon, it is absurd for Intervenors to now object to contrary evidence on the very same issues presented by SCE – the party that would actually be charged with implementing any such RFO.

Intervenors' assertion that admissible testimony from Mr. Sekhon is limited to those areas that SCE's counsel identified as the intended scope of his testimony at the hearing is also without merit. First, as explained by SCE's counsel during the Committee Conference on September 18, 2017, the three limitations paraphrased in the Motion to Strike were identified at the outset of testimony from SCE's other witness, Mr. Chinn, and were intended to apply to his testimony only. Second, to the extent the limitations paraphrased in the Motion to Strike were made applicable to Mr. Sekhon's testimony as suggested by the Intervenors, the testimony was within the scope of those limitations. As stated in the Motion to Strike, among the acceptable areas of inquiry identified by SCE's counsel was "historical information regarding SCE's procurement of distributed energy resources in other areas." (Motion to Strike at 4.) The testimony that Intervenors find objectionable was based on SCE's experience with prior RFOs, and, therefore, squarely within the parameters laid out by SCE's counsel. Finally, statements of counsel regarding the acceptable scope of inquiry for a witness would not provide a basis for striking testimony that the witness might decide to provide that is arguably outside that scope in any event.

3. **The only permissible response to the Motion to Strike is for the Committee to issue a written order reflecting the rulings made at the hearing based on the requests made at the hearings.**

For all of the reasons set forth herein, the only permissible response to the Motion to Strike is for the Committee to issue a written order pursuant to Cal. Code Regs., tit. 20, § 1215(a). That order must reflect the ruling made at the hearing based on the requests made at the hearing. The Intervenors would then be free to seek review of that order by the full Commission, although as set forth above, any such petition will fail since the rulings of the Hearing Officer were proper in all respects.

DATED: September 18, 2017

Respectfully submitted,

/s/ Michael J. Carroll

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