

Robert Sarvey
501 W. Grantline Rd
Tracy, Ca. 95376
(209) 835-7162

DOCKET	
06-AFC-6	
DATE	MAR 06 2008
RECD.	MAR 06 2008

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the matter of)	
Eastshore Energy Center)	Docket Number 06-AFC-6
)	Section 1231 Complaint
)	Robert Sarvey

To: William Chamberlain
1516 Ninth Street
Sacramento, Ca. 95814

From: Robert Sarvey
501 W. Grantline Rd.
Tracy, Ca. 95376
(209) 835-7162

RE: Formal Complaint under Section 1231 Against Susan Gefter, Hearing Officer for Eastshore Energy Center (06-AFC-6) for Lack of Judicial Demeanor and Improper Rulings

Background

On January 11, 2008 I filed a complaint against hearing officer Gefter which is attached. (Attachment A) The basis of the complaint is that on December 17, 2007, the California Energy Commission held an evidentiary hearing for the Eastshore Energy Center 06-AFC-6. I participated as an intervener and provided timely-filed expert testimony in air quality for the proposed project. The complaint was lodged against the Hearing Officer Susan Gefter for lack of judicial demeanor and denial of due process (improper rulings) during the course of the hearing. As stated in the attached original complaint, during my cross examination of the applicants and the staffs witnesses, I was interrupted and asked to present my testimony. The following exchange occurred between me and the Hearing Officer Gefter.

25 So Mr. Sarvey, if you would like to
1 present direct testimony now. I know that you
2 have offered yourself as an expert witness on air
3 quality. As you know, I haven't ever qualified
4 you as an expert witness on air quality, however,
5 I will qualify you as an expert intervenor and
6 very knowledgeable in our proceedings. So if you
7 want to, you know, be sworn in I'll take your
8 testimony.
9 MR. SARVEY: I'd have to object to that.
10 HEARING OFFICER GEFTER: Okay. Do you
11 want to be sworn in?

12 MR. SARVEY: I'd have to object to your
13 not qualifying me as an expert witness. **I have**
14 the educational background and the experience.
15 HEARING OFFICER GEFTER: **I know and**
16 other hearing officers have qualified you but I
17 won't. However, I will accept your testimony and
18 if you want to be sworn I will swear you in.
19 MR. SARVEY: I'll do so under
20 objection.
21 HEARING OFFICER GEFTER: Okay
(Rt 12-17-08 page 108)

Hearing Officer Gefter ruled that I would not be allowed to participate as an expert witness and ruled without affording me an opportunity to present my credentials. Neither did she hear from all the other parties in the matter, including staff, other interveners, and the applicant. It is my view, supported by years of case law and judicial procedure that an objection to my being considered an "expert witness" should have originated from one of the other parties. While I am aware that a judge or hearing officer can make a ruling on their own motion, in the furtherance of justice and based upon facts available to the court, no such finding or motion or statement of facts was proffered by Hearing Officer Gefter. She offered only a personal opinion not based upon any evidence whatsoever. It is most telling that the Hearing Officer Gefter stated that "other hearing officers have qualified you as an expert but I wont". This statement demonstrates bias, lack of judicial demeanor, and constitutes evidence of an improper ruling.

Hearing Officer Gefter's actions at the December 17, 2007 hearings constituted a lack of judicial demeanor and improper rulings. The remedy I asked for was that she be admonished and instructed to not make rulings without a sound basis in law and only after following proper procedure. I also requested that she offer an apology for her conduct. I also requested that, given my long history of involvement in CEC siting cases, I be declared an expert in air quality matters in all future CEC siting hearings, subject to objection by a party to the proceeding and appropriate due process.

It has now been almost two months and I have received no response to my complaint from William Chamberlain the Chief Counsel of the Energy

Commission. I am now filing a formal complaint under Section 1231 and requesting a response form the commission as required by section by 1232.

After reviewing the transcript below I see that I have received an apology but I received no notice that I was to appear to be "voir dired" at the January 14, 2008 Evidentiary Hearing.

.
18 I think we're almost done. There was
19 one more thing that I wanted to bring up.
20 Mr. Sarvey did not attend today's hearing,
21 although he filed a petition of some sort being
22 very concerned that he was not allowed to be
23 designated an expert witness in air quality and he
24 asked for an apology. And I certainly would like
25 to apologize to Mr. Sarvey. I am very sorry that
1 he is not here so he could hear it in person.
2 Mr. Sarvey's r,sum,, his qualifications,
3 were included with his testimony in Exhibit 800
4 and so we could have at that time, the parties
5 could have voir dired him on his r,sum,. Since he
6 is not here we can't do the voir dire but you do
7 see that he does have his qualifications attached
8 to his testimony. He did testify. So I am sorry,
9 again, and he will read this in the transcript
10 that I tried to accommodate his concerns.
(Rt 1-14-08 page 400, 401)

This has caused irreparable damage to the credibility of this proceeding. Other air quality witnesses were also treated with the same unprofessional demeanor. (RT 12-17-08 pages 140-149) The remedy I now request is a rehearing of air quality issues with another hearing officer since it is clear that a fair and impartial hearing will now not occur. The results of these actions are that my issues will not be adjudicated and the applicant has asked the Commission to consider my testimony irrelevant.

"Mr. Sarvey has considerable interest in power plant air quality issues but he does not possess any experience or educational training in air quality analysis. Therefore Eastshore questions the credibility and relevance of the testimony of both Dr. Zannetti and Mr. Sarvey.
(Eastshore Applicant Opening Brief Page 61)

Staff in their reply brief is even denying the existence of my testimony stating that I never raised the issue of the new NO2 standard.

“Intervenor Sarvey also raises new issues for the first time in his brief, arguing that the EEC will violate a new state NO2 standard that is not in effect, that the SO2 emission estimate used for the analysis of the EEC are unrealistic, and that the staff proposal to mitigate ammonia emissions through requiring Sox Emission Reduction credits is flawed.....

Intervenor Sarvey is an experienced participant in Energy commission proceedings and had ample opportunity to address these issues in his written testimony or upon cross examination of other witnesses. He chose not to do so and should not be allowed to raise them and make factual assertions for the first time now. (Staff Reply Brief pages 2,3)

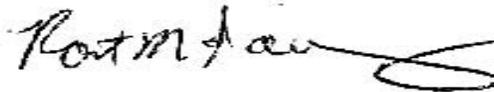
One only need to examine the record to see that I first raised the NO2 standard issue in my prefiled testimony. (Exhibit 800) I also raised the issue in cross examination with Mr Birdsall. (RT 12-17-07 page 102-105) The fuel sulfur issues were raised on cross examination. (RT 12-17-07 pages 97-99) and were an attempt to save the applicant and the commission an upcoming amendment which will happen in the future should this project be approved. The ammonia issues were raised by the hearing officer (RT 12-17-07 pages 37-39)

First the applicant asks the committee to treat my testimony as irrelevant then staff denies that I ever raised the issues and asks the committee to not allow me to raise them. This is all the results of the lack of judicial demeanor, improper ruling, and lack of due process and denial of my rights by the hearing officer.

As I stated above the remedy I seek now is a complete rehearing of the air quality issues by a different hearing officer. It is clear from the record that I have suffered from this hearing officer's actions and that no impartial decision on air quality matters can occur.

**DECLARATION OF
Robert Sarvey**

I Robert Sarvey declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read "Robert Sarvey", written over a horizontal line.

Signed 3/6/08

Attachment A

To: Stan Valkowsky and William Chamberlain
1516 Ninth Street
Sacramento, Ca. 95814

From: Robert Sarvey
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Tracy, Ca. 95376
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RE: Complaint Against Susan Gefter, Hearing Officer for Eastshore Energy Center (06-AFC-6) for Lack of Judicial Demeanor and Improper Rulings

On December 17, 2007, the California Energy Commission held an evidentiary hearing for the Eastshore Energy Center 06-AFC-6. I participated as an intervener and provided timely-filed expert testimony in air quality for the proposed project. This complaint is lodged against the Hearing Officer Susan Gefter for lack of judicial demeanor and denial of due process (improper rulings) during the course of the hearing. During my cross examination of the applicant and the staffs witness, I was interrupted and asked to present my testimony. The following exchange occurred between me and the Hearing Officer Gefter.

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21 HEARING OFFICER GEFTER: Okay

Hearing Officer Gefter ruled that I would not be allowed to participate as an expert witness and ruled without affording me an opportunity to present my credentials. Neither did she hear from all the other parties in the matter, including staff, other interveners, and the applicant. It is my view, supported by years of case law and judicial procedure that an objection to my being considered an “expert witness” should have originated from one of the other parties. While I am aware that a judge or hearing officer can make a ruling on their own motion, in the furtherance of justice and based upon facts available to the court, no such finding or motion or statement of facts was proffered by Hearing Officer Gefter. She offered only a personal opinion not based upon any evidence whatsoever. It is most telling that the Hearing Officer Gefter stated that “other hearing officers have qualified you as an expert but I wont”. This statement demonstrates bias, lack of judicial demeanor, and constitutes evidence of an improper ruling.

I had intended to support CEC staff’s proposed condition of certification Public Health-1 in the next segment of the hearing. However, when I heard Hearing Officer Gefter tell me at the end of my air quality statement that “you are done”, I left the hearing thinking that she had told me I was not welcome to participate further. I only learned later that I did not hear her complete her statement allowing me to stay if I had more to contribute, presumably in public comment, due to the simultaneous talking by other parties in the room. In my view, a Hearing Officer should not tell a witness or an intervenor that he is “done” except under extraordinary circumstances (e.g., repetitive or argumentative testimony which did not exist at the time).

Hearing Officer Gefter’s actions at the December 17, 2007 hearings constitute a lack of judicial demeanor and improper rulings. The remedy should be admonition to hearing officer not to make rulings without a sound basis in law and only after following proper procedure. She should be required to give an

apology for her conduct. I also request that, given my long history of involvement in CEC siting cases, I be declared an expert in air quality matters in all future CEC siting hearings, subject to objection by a party to the proceeding and appropriate due process.

