

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**

**APPLICATION FOR CERTIFICATION FOR THE
AVENAL ENERGY PROJECT**

**DOCKET NO. 08-AFC-1
(AFC filed February 21, 2008)**

**AVENAL POWER CENTER, LLC'S
MOTION TO STRIKE REBUTTAL TESTIMONY OF INTERVENOR ROB SIMPSON**

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I. INTRODUCTION

Pursuant to section 1716.5 of Title 20 of the California Code of Regulations, Avenal Power Center, LLC (“Avenal Power”) submits this motion to strike the following items from Intervenor Rob Simpson’s testimony in the Application for Certification for the Avenal Energy Project (“Project”) proceedings before the California Energy Commission (the “Commission”): (1) the sections of Mr. Simpson’s Rebuttal Testimony on the topics of alternatives and best available control technology requirements for PM₁₀ emissions; (2) Exhibits A through Z and AA through DD to the rebuttal testimony of Mr. Simpson; and (3) Mr. Simpson’s petition to intervene to the extent that Mr. Simpson purports to introduce it as testimony.

On June 8, 2009, Mr. Simpson petitioned to intervene in the Project proceedings. On June 11, 2009, the Avenal Energy Project Application for Certification (AFC) Committee (the “Committee”) granted Mr. Simpson’s request. From approximately 4 p.m. on June 15, 2009 through approximately 11 a.m. on June 16th, 2009, Mr. Simpson submitted an extensive amount of documents attached to e-mails which he offers as his rebuttal testimony. However, the vast majority of these documents were previously submitted during an entirely different proceeding, were submitted as comment rather than testimony, and are completely irrelevant to the Project proceedings presently before the Commission. Furthermore, the vast majority of the documents Mr. Simpson offers as his rebuttal testimony are in fact not testimony, nor do they rebut any testimony already filed in the Project proceedings. Avenal Power respectfully requests the Committee to strike Mr. Simpson’s rebuttal testimony as described below.

II. APPLICABLE LAW

The Commission's regulations allow the admission of any relevant, noncumulative evidence if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. (20 C.C.R. § 1212[a].) As a general rule, evidence is relevant if it has any tendency in reason to prove a disputed fact that is of consequence to the determination of the action. (Cal. Evid. Code § 210.) While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, certain basic requirements for the conduct of any hearing at which facts are to be determined are necessary, including that the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, and ordinarily, hearsay evidence standing alone can have no weight. (*Ashford v. Culver City Unified School Dist.*, 130 Cal. App. 4th 344 [2d Dist. 2005].)

The Commission's regulations provide that oral or written testimony provided by any party shall be under oath. (20 C.C.R. § 1212[b].) The deadline for submitting initial testimony in this proceeding was June 8, 2009. The deadline for submitting rebuttal testimony in this proceeding was June 15, 2009. (See Revised Committee Scheduling Order dated April 24, 2009, at page 3.¹)

III. GENERAL OBJECTIONS

A. **Mr. Simpson's Petition to Intervene Is Not Testimony and Should Not Be Admitted Into Evidence In This Proceeding.**

On June 8, 2009, Mr. Simpson filed a petition to intervene in the Project proceedings. This petition to intervene includes his request to intervene, a request to stay the proceedings, and his petition for financial hardship. It also includes three attachments: an e-mail chain regarding Mr. Simpson's complaints to the U.S. Environmental Protection Agency (EPA); a remand order issued by the EPA's Environmental Appeals Board (EAB); and a previously filed informal request to reopen the public comment period for the Project.

On the fourth (unnumbered) page of Mr. Simpson's filing, he alleges that he had previously filed "his testimony and petition for intervention." Mr. Simpson neither labeled any

¹ Available at http://www.energy.ca.gov/sitingcases/avenal/notices/2009-04-23_REVISIED_SCHEDULING_ORDER.PDF.

portion of his June 8th petition as testimony nor did he serve his petition on the service list as required by all parties filing testimony. (In fact, the Committee granted Mr. Simpson's petition to intervene prior to Avenal Power receiving a copy of his petition.) Since the Committee's deadline for filing testimony was June 8, 2009, Mr. Simpson's statement in his rebuttal document cannot be construed as somehow "bootstrapping" his petition for intervention as timely filed testimony. Such an interpretation would deprive Avenal Power of its right guaranteed by the Administrative Procedure Act to rebut testimony presented against it, as Mr. Simpson's claim was first raised on the evening of June 15, the deadline for filing rebuttal testimony. (See Cal. Govt. Code § 11513[b].) Consequently, Mr. Simpson's Petition for Intervention should not be treated as testimony or evidence in this proceeding. Avenal Power has no objection to the treatment of this document as public comment.

B. Mr. Simpson's Rebuttal Testimony On the Topic of Alternative Energy Sources Is Mere Opinion and Is Not Supported By Evidentiary Testimony.

On the fifth (unnumbered) page of Mr. Simpson's Appeal of Decision, Rebuttal Testimony and Request for New Schedule (undated; filed May 15, 2009), Mr. Simpson alleges that the Commission's analysis is deficient with respect to transmission system engineering and its impacts on the development of renewable energy sources. However, beyond those allegations, Mr. Simpson does nothing to indicate the manner in which either Avenal Power's or Staff's analyses of transmission issues are deficient.

Courts have made clear that nonexpert opinions that are speculative and conjectural do not constitute substantial evidence; nor does an expert's opinion that does not rest on relevant facts. (See *Reimel v. Alcoholic Beverage Control Appeals Bd.*, 255 Cal. App. 2d 40 [1 Dist. 1967]; *Heggin v. Workmen's Comp. App. Bd.*, 4 Cal. 3d 162 [1971].) CEQA requires environmental decisions to be "based on substantial evidence in light of the whole record," not "argument, speculation, unsubstantiated opinion or narrative . . ." (Cal. Pub. Res. Code § 21082.2[a].) Mr. Simpson has not proven himself to be an expert on the matters upon which he has offered his testimony, and therefore his mere opinion should not be accepted as testimony. By failing to present any actual evidence on this issue, Mr. Simpson's arguments cannot be characterized as rebuttal testimony.

In sum, to the extent that Mr. Simpson alleges that his comments regarding transmission system engineering and project alternatives constitute testimony, Avenal Power objects to the admission of this testimony as untimely. To the extent that Mr. Simpson alleges that these same comments constitute rebuttal testimony, Avenal Power objects to the admission of this testimony on the grounds that it is unsubstantiated opinion and it does not, in fact, rebut previously filed testimony in this case. Avenal Power does not object to the acceptance of Mr. Simpson's comments on these issues as public comment.

C. **Mr. Simpson's Rebuttal Testimony On the Topic of Best Available Control Technology Requirements for PM₁₀ Emissions Is Mere Opinion and Is Not Supported by Evidentiary Testimony.**

On the fifth (unnumbered) page of Mr. Simpson's Appeal of Decision, Rebuttal Testimony and Request for New Schedule (undated, filed May 15, 2009), Mr. Simpson argues that the PM₁₀ emission limit established by the San Joaquin Valley Air Pollution Control District (SJVAPCD) for the Project does not constitute best available control technology (BACT). Mr. Simpson's assertions on this matter are not proper testimony because Mr. Simpson fails to provide support for his assertions.

While disagreeing with the SJVAPCD's determination, Mr. Simpson provides no basis for his disagreement, merely restating comments that were previously made by CURE, and were previously addressed by the District. Mr. Simpson's comment was already made by another intervenor in this proceeding (CURE) to the SJVAPCD, and the SJVAPCD addressed this comment in the Final Determination of Compliance (FDOC) for the Project. (See Exhibit 58, Attachment L.) Mr. Simpson also cites to a list of power projects referred to as "Table A-2", but this table was not included in his rebuttal testimony. As discussed above, argument, speculation, and unsubstantiated opinion or narrative are not substantial evidence under CEQA. (Cal. Pub. Res. Code § 21082.2[c].) Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (*Id.*) As discussed in further detail in Part IV below, the majority of the exhibits submitted in support of Mr. Simpson's argument regarding air quality issues were submitted to an entirely different air district, regarding a different power plant project. Other projects in other districts are not subject to the SJVAPCD rules that are applicable to the Project, and therefore documents prepared for projects in other districts are not

helpful in analyzing the Project's compliance with SJVAPCD rules. By failing to present any actual evidence on this issue, Mr. Simpson's arguments cannot be characterized as testimony.

In sum, to the extent that Mr. Simpson alleges that his comments regarding BACT for PM₁₀ emissions constitute testimony, Avenal Power objects to the admission of this testimony as untimely. To the extent that Mr. Simpson alleges that these same comments constitute rebuttal testimony, Avenal Power objects to the admission of this testimony on the grounds that it is unsubstantiated opinion and it does not, in fact, rebut previously filed testimony in this case. Avenal Power does not object to the acceptance of Mr. Simpson's comments on this issue as public comment.

D. The Exhibits to Mr. Simpson's Rebuttal Testimony Do Not Constitute Rebuttal Testimony, Are Not Relevant to the Project Proceedings, and Should Not Be Entered Into Evidence In This Proceeding.

As described in greater detail below, the majority of the documents filed by Mr. Simpson are comment letters, created by persons other than Mr. Simpson, and submitted during the proceedings of a project unrelated to the Project proceedings. Most of these documents were submitted as comment to the Bay Area Air Quality Management District (BAAQMD) during the proceedings for the Russell City Energy Center (the "Russell City project"). With the possible exception of Exhibit W, none of the exhibits submitted by Mr. Simpson were ever intended to be testimony, and they were not even submitted as testimony during the Russell City project proceedings. Now, Mr. Simpson purports to offer these documents as testimony in the Project proceedings. This is entirely inappropriate. Not only were these documents prepared as comment rather than testimony in the first instance, they were prepared for the proceedings in an entirely different project. Furthermore, the majority of these comments were made to the local air district, not to the Commission. Mr. Simpson's attempt to submit these comments as testimony in the proceedings for an unrelated project, before a different regulatory agency, is inappropriate. The Commission's review of an application for certification is highly project-specific. Information regarding power generation in general or evidence pertaining to other projects is not helpful given the amount of highly relevant, project-specific analysis that has already been conducted for the Project. The Committee should strike Mr. Simpson's exhibits A through V and X through DD for this reason.

The form of Mr. Simpson's exhibits also renders them unsuitable for admission as testimony in the Project proceedings. Mr. Simpson's approach to participation in this proceeding appears to be in the nature of submission of a telephone directory, consisting of dozens of documents, some with many attachments of their own, created to address different issues in a different proceeding. Mr. Simpson has essentially dumped a pile of largely irrelevant documents into the docket for the Project, and he expects the Committee and Avenal Power to deduce his testimony therefrom. If the Committee accepts this approach, Mr. Simpson, or any other intervenor in a proceeding, would be able to simply copy and submit all opposition documents filed in one or more prior Commission proceedings, and request each applicant (or the Commission) to address every issue ever raised in these prior proceedings. This raises substantial questions of equity and due process, and reduces the Commission's carefully reasoned evidentiary process to near chaos. The exhibits included by Mr. Simpson fall into several categories:

- Documents that were written as comments (not sworn testimony) for submission to another agency in another regulatory proceeding. This includes Simpson Exhibits A through P, R, S and X (all filed with BAAQMD as comments on the issuance of a proposed permit for the Russell City project) and Exhibit Q (apparently filed with the California Public Utilities Commission related to a proposed amended Power Purchase Agreement between Pacific Gas and Electric Company and Calpine regarding the Russell City project).
- Prior regulatory filings unrelated to any specific facility or siting case. This includes Simpson Exhibit T (a petition for reconsideration of an EPA rulemaking) and Exhibit U (EPA's response to the petition for reconsideration).
- Presentations and papers unrelated to any direct or rebuttal testimony. This includes Simpson Exhibits V, Y, Z, AA and BB.
- A comment letter (Exhibit CC) from the Project proceeding filed by another party who is not an intervenor in this case.

- A duplicate of another Exhibit (Exhibit DD, which consists of the first thirteen pages of Exhibit G.)
- Newly filed initial testimony (Exhibit W), submitted after the Committee’s deadline for initial testimony.

In all, Mr. Simpson is attempting to introduce over 1000 pages of new material which is largely irrelevant to the potential environmental impacts of the Project and, more significantly, which does not clearly rebut any previously submitted testimony. Avenal Power respectfully moves to strike all of Mr. Simpson’s exhibits for the reasons described in detail in Section IV below.

E. The Exhibits Filed by Mr. Simpson Are Hearsay and Are Not Sworn or Under Oath.

Testimony taken from witnesses in administrative hearings must have the same threshold guarantee of truthfulness as testimony taken in a court of law. (*Marlow v. Orange County Human Services Agency*, 110 Cal. App. 3d 290 [4 Dist. 1980].) The Commission’s regulations require both oral and written testimony provided by any party to be made under oath. (20 C.C.R. § 1212[b].) In this case, there is no indication that the documents submitted by Mr. Simpson were made under oath.

Furthermore, Avenal Power objects to the documents filed by Mr. Simpson because they are mere hearsay. Hearsay evidence is evidence of a statement made at another time or place than by the witness testifying at the hearing and offered to prove the truth of the matter stated. (Cal. Evid. Code § 1200.) The Commission’s regulations allow the use of hearsay evidence “for the purpose of supplementing or explaining other evidence.” (20 C.C.R. § 1212[d].) However, Mr. Simpson’s testimony appears to be nothing but hearsay evidence, occasionally submitted in support of other hearsay evidence. Mr. Simpson has alleged that he has participated in at least seven siting cases before this Commission and he holds himself out as “[bringing] a perspective to licensing cases that is often otherwise unavailable to persons involved in their first siting.” (Rob Simpson Petition for Intervention at 2.) Consequently, he cannot claim to be unaware of the Commission’s regulations and the evidentiary requirements therein. The exhibits submitted

by Mr. Simpson are unsworn and are improper hearsay evidence and the Committee should not accept these documents as testimony.

IV. OBJECTIONS TO SPECIFIC EXHIBITS TO MR. SIMPSON'S TESTIMONY

A. Exhibit A

Simpson Exhibit A is an e-mail comment from Douglas Kirk, Regional Sales Manager for Fuel Tech, Inc. describing Fuel Tech's urea technology. Exhibit A includes as an attachment a product brochure from Fuel Tech. The documents contained in Exhibit A were filed with BAAQMD during their review of the Russell City project. The use of urea as an alternative to ammonia was discussed in the AFC, and was rejected because it "has not been commercially demonstrated for use with SCR on gas turbines attempting to meet the extremely low NO_x levels proposed for the Project. Therefore, this technology was eliminated from consideration." (Exhibit 1 at 5-20.)

There are no other references to urea in the more than 6000 pages of documents filed with the Commission in this proceeding, including data requests, data responses, Preliminary Staff Assessment (PSA), Final Staff Assessment (FSA), Preliminary Determination of Compliance (PDOC), Final Determination of Compliance (FDOC), and comments on any of those documents. Consequently, Exhibit A cannot be characterized as rebuttal testimony, as it raises an entirely new issue for the first time. Allowing this exhibit in as initial testimony would deprive Avenal Power of its right guaranteed by the Administrative Procedure Act to rebut testimony presented against it, as Mr. Simpson's claim was first raised on the evening of June 15, the deadline for filing rebuttal testimony. (See Cal. Govt. Code § 11513[b].) Because Exhibit A is a comment letter filed in another proceeding on a different project and cannot be characterized as rebuttal testimony, Avenal Power moves to strike Exhibit A.

B. Exhibit B

Simpson Exhibit B is a comment letter from the Alameda County Health Care Services Agency, filed with the BAAQMD during their review of the Russell City project. It addresses the potential air quality and public health impacts of the Russell City and Eastshore projects.

The impacts of those projects are different from those of Avenal Energy. These differences relate to generation technologies (Eastshore would have used reciprocating engines, while Avenal would be a combined-cycle plant, like Russell City) and location (Russell City and Eastshore are in BAAQMD, while Avenal is in SJVAPCD). There is nothing in this document that informs or addresses the health risk assessment associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit B.

C. Exhibit C

Simpson Exhibit C is a comment letter from Maureen Barrett (AERO Engineering Services), filed with the BAAQMD during their review of the Russell City project. This document is specific to the air quality impact analysis prepared by the BAAQMD for the Russell City project. Nothing in this document informs or addresses the air quality impact analysis prepared for the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit C.

D. Exhibit D

Simpson Exhibit D is a comment letter from Diane Zuliani, an instructor at Chabot College, filed with the BAAQMD during their review of the Russell City project. This document is specific to the alleged air quality impacts of the Russell City project on Chabot College. Chabot College is located nowhere near the Project. In fact, it is in an entirely different air basin (San Francisco Bay Area Air Basin, rather than San Joaquin Valley Air Basin in which the Project lies). There is nothing in this document that informs or addresses the air quality impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit D.

E. Exhibit E

Simpson Exhibit E is a comment letter from Mike Perlmutter of Audubon California, filed with the BAAQMD during their review of the Russell City project. This document relates to the alleged air quality impacts of the Russell City project on wetlands in the Hayward area.

No one has alleged that the Project will have any adverse impacts on wetlands in the Hayward area, and this issue has not been raised during prior comments on the PDOC or PSA, nor is it addressed in initial testimony. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit E.

F. Exhibit F

Simpson Exhibit F is a comment letter from Paul Cort (Earthjustice), filed with the BAAQMD during their review of the Russell City project. Exhibit F includes the following attachments: (A) BACT determinations for another project; (B) an amended petition for reconsideration brought before the EPA for another project; (C) an e-mail message from Brian Lusher (BAAQMD) to Weyman Lee (BAAQMD) regarding the Gateway project; (D) promotional materials on General Electric H System combined-cycle gas turbines; (E) materials produced by Westinghouse Electric Corporation on Westinghouse's Advanced Turbine Systems program; (F) letter from James Goldstone (California Air Resources Board [CARB]) to Wayne Nastri (EPA Region 9) (dated December 17, 2007); (G) letter from James Goldstone (CARB) to Wayne Nastri (EPA Region 9) (dated October 15, 2008); (H) letter from Stephen Johnson (EPA) to Paul Cort (Earthjustice).

Exhibit F was not properly or timely served on parties in this case. At 10:51 am of the morning after the deadline for filing his rebuttal testimony, Mr. Simpson circulated links to a BAAQMD web site so that parties in the Avenal proceeding could directly download this twelve megabyte file. This document and its multiple exhibits address the BAAQMD's BACT determination for the Russell City project and the BAAQMD's analysis of PM_{2.5} air quality impacts of the Russell City project. There is nothing in these documents that informs or addresses the air quality impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit F.

G. Exhibit G

Simpson Exhibit G is a comment letter from the Sierra Club, filed with BAAQMD during their review of the Russell City project. This document contains 27 exhibits comprising nearly 400 pages addressing the BAAQMD's BACT determination for the Russell City project.

Simpson Exhibit G was not properly or timely served on parties in this case. As was the case with Exhibit F, Mr. Simpson circulated a link to a BAAQMD web site so that parties in the Avenal proceeding could directly download this 22 megabyte file. As described above, this document and its multiple exhibits address the BAAQMD's BACT determination for the Russell City project. There is nothing in these documents that informs or addresses the air quality impacts associated with the Project, nor does it rebut any testimony filed in this case. Exhibit G was not drafted as testimony, and it contains attachments from a wide variety of sources, none of which were prepared as testimony. For these reasons, Avenal Power moves to strike Exhibit G.

H. Exhibit H

Simpson Exhibit H is a comment from Mathias van Thiel e-mailed to the BAAQMD during their review of the Russell City project. This document relates to alleged deficiencies in the list of pollutants identified by the BAAQMD in its proposed PSD permit for the Russell City project. There is nothing in this document that informs or addresses the air quality impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit H.

I. Exhibit I

Simpson Exhibit I is a comment letter from Debra Weiss filed with the BAAQMD during their review of the Russell City project. This document related to the alleged public health impact and impact to wetlands of the Russell City project. There is nothing in this document that informs or addresses the air quality, public health, or wetlands impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit I.

J. Exhibit J

Simpson Exhibit J is a comment letter from Karen Pierce (Bayview Hunters Point Community Advocates) filed with the BAAQMD during their review of the Russell City project. This document relates to the potential displacement of electricity produced at the Potrero Power Plant by the Russell City project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit J.

K. Exhibit K

Simpson Exhibit K is a comment letter from Ethan Wimert (Golden Gate University Environmental Law and Justice Clinic) filed with the BAAQMD during their review of the Russell City project. Exhibit K includes the following attachments: (1) comment letter from Deborah Jordan (EPA) to Jack Broadbent (BAAQMD) regarding the PSD delegation agreement between BAAQMD and EPA; (2) notes of conversation referred to in Statement of Basis for draft amended PSD permit for the Russell City project; (3) comment letter from Paul Richins (EPA) to BAAQMD regarding amended PDOC for the Russell City project; (4) article from Combined Cycle Journal regarding the Palomar Energy Center; (5) e-mail from Shaheerah Kelly (EPA Region 9) to Bryan Sixberry (General Electric) regarding Rapid Response and OpFlex technologies; (6) a document purporting to be testimony of Sandra Witt of Alameda County Public Health Department regarding environmental justice issues with the Eastshore project; (7) EPA memorandum regarding statutory and regulatory authorities under which environmental justice issues may be addressed in permitting; (8) BAAQMD resolution to continue reducing air contaminants in impacted communities; (9) screenshot of PG&E web page containing information on gas system sulfur content; (10) screenshot of PG&E web page describing sulfur compounds in gas.

Exhibit K relates to the BAAQMD's determination of BACT for the Russell City project, and specific conditions of approval proposed for that project. There is nothing in this document that informs or addresses the FDOC issued by the SJVAPCD for Avenal, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit K.

L. Exhibit L

Simpson Exhibit L is a comment letter from Rob Simpson and Californians for Renewable Energy (CARE), filed with the BAAQMD during their review of the Russell City project. Exhibit L includes the following attachments: (1) marketing materials regarding the Fuel Tech NOxOUT ULTRA system; and (2) hearing board variance quarterly reports from San Diego Gas and Electric (SDG&E). Exhibit L relates to comments filed with the BAAQMD regarding the proposed permit for the Russell City project, and complaints lodged with the US EPA and California Air Resources Board, also in conjunction with the Russell City project. Issues addressed in this document and its exhibits include alleged deficiencies in the BAAQMD's noticing procedures, BACT analysis, treatment of greenhouse gas emissions, sulfuric acid mist, ambient NO₂ impacts, the use of ammonia for SCR, adequacy of emission reduction credits, and numerous other issues – all with respect to the Russell City project. There is nothing in this document or associated exhibits that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit L.

M. Exhibit M

Simpson Exhibit M is a comment letter from Shana Lazerow (Communities for a Better Environment), filed with the BAAQMD during their review of the Russell City project. This document relates to the air quality impacts of the Russell City project in the Bay Area, endorsing the comments submitted by others in that proceeding. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit M.

N. Exhibit N

Simpson Exhibit N is a comment letter from Pete Stark (U.S. House of Representatives) filed with the BAAQMD during their review of the Russell City project. This document relates to alleged air quality and public health impacts, and impact to wetlands, of the Russell City

project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit N.

O. Exhibit O

Simpson Exhibit O is a comment letter from residents of Hayward, filed with the BAAQMD during their review of the Russell City project. This document relates to alleged air quality impacts, and impacts to wetlands, of the Russell City project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit O.

P. Exhibit P

Simpson Exhibit P is a comment letter from Robert Sarvey filed with the BAAQMD during their review of the Russell City project. Included within Exhibit P are the hearing board variance quarterly reports from SDG&E, which were also included within Simpson Exhibit L (discussed above). This document relates to air quality impacts, BACT requirements, ammonia transportation, ERC requirements, greenhouse gas emissions, and environmental justice issues, all related to the Russell City project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit P.

Q. Exhibit Q

Simpson Exhibit Q is a petition produced by Rob Simpson in opposition to fossil fuel fired power plants. This petition was apparently filed with the California Public Utilities Commission during their review of an amended Power Purchase Agreement for the Russell City project. This document relates to the location, air quality impacts, impacts on endangered species, and greenhouse gas emissions from the Russell City project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit Q.

R. Exhibit R

Simpson Exhibit R is a comment letter from Evelyn Cormier (Ohlone Audubon Society), filed with the BAAQMD during their review of the Russell City project. This document relates to air quality and ecological impacts of the Russell City project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit R.

S. Exhibit S

Simpson Exhibit S is a comment letter from Laura Baker (Native Plant Society, East Bay Chapter), filed with the BAAQMD during their review of the Russell City project. This document relates to air quality and wetlands impacts of the Russell City project. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit S.

T. Exhibit T

Simpson Exhibit T is a petition to the Administrator of the EPA requesting reconsideration of a final rule issued by EPA regarding the federal New Source Review program as it relates to PM_{2.5}. The Project is subject to the rules of the SJVAPCD regarding nonattainment new source review, and of the EPA regarding Prevention of Significant Deterioration. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit T.

U. Exhibit U

Simpson Exhibit U is a letter from EPA Administrator Steven Johnson to Paul Cort of Earthjustice, responding to the petition for reconsideration contained in Simpson Exhibit T. This document relates to the same issues as Simpson Exhibit T. There is nothing in this document

that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit U.

V. Exhibit V

Simpson Exhibit V is a study prepared by David Roland Holst of the University of California Berkeley Center for Energy, Resources, and Economic Sustainability (CERES). This document presents an analysis of “the economic impact of CARB’s past and future policies to reduce fossil fuel generated energy demand. ... This study examines the economy-wide employment effects of the state’s landmark efficiency policies over the last thirty-five years, and forecasts the economic effects of significantly more aggressive policies proposed to reduce emissions to 1990 levels by 2020.” There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit V.

W. Exhibit W

Simpson Exhibit W appears to be new testimony filed by Mr. Simpson relating to the Project. This document relates to proposed interpollutant offsets (referencing documents and correspondence regarding another CEC proceeding), the proposed ammonia slip level, and transportation impacts related to the use of ammonia. These issues were addressed in comments on, and responses to, the PDOC and/or PSA, and no comments or testimony on these issues were filed by the Committee’s June 8 deadline for the submission of testimony. Exhibit W presents new, initial testimony, and it is untimely because it was filed after the Committee’s June 8 deadline. Avenal Power moves to strike Exhibit W as untimely.

X. Exhibit X

Simpson Exhibit X is a comment letter from Ernest Pacheco (Citizens Against Pollution), filed with the BAAQMD during their review of the Russell City project. This document relates to a paper relating localized air quality impacts to localized carbon dioxide (CO₂) emissions. There is nothing in this document that informs or addresses any environmental impacts

associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit X.

Y. Exhibit Y

Simpson Exhibit Y is a copy of an article by Mark Jacobson (Stanford University), published in Geophysical Research Letters in February 2008. This document relates to an alleged relationship between ambient CO₂ concentrations and air pollution mortality. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit Y.

Z. Exhibit Z

Simpson Exhibit Z is a copy of an article by Mark Jacobson (Stanford University), dated March 2009 (publication unknown) related to the enhancement of local air pollution by urban CO₂ domes. The Project is not located in an urban area, and there is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit Z.

AA. Exhibit AA

Simpson Exhibit AA is a copy of an article by Robert Freehling (California-Nevada Regional Conservation Committee, Energy-Climate Committee) dated January 2009 (publication unknown) suggesting that California's legacy steam power plants should not be replaced. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit AA.

BB. Exhibit BB

Simpson Exhibit BB is a copy of a resolution purported to have been adopted by the California/Nevada Regional Conservation Committee, Sierra Club California, in January 2008

opposing the construction of all new large (> 50 MW) gas fired power plants in California. There is nothing in this document that informs or addresses any environmental impacts associated with the Project, nor does it rebut any testimony filed in this case. Avenal Power moves to strike Exhibit BB.

CC. Exhibit CC

Simpson Exhibit CC is a comment letter from Rory Cox (Pacific Environment), filed with the Commission on June 8, 2009, and represents the public comment of Pacific Environment regarding the Project. This document was previously filed in the Project proceeding on June 8, 2009. Avenal Power has no objection to this document being treated as the public comment that it is. However, Avenal Power objects to the inclusion of this document as evidence, and moves to strike Exhibit CC from Mr. Simpson's testimony.

DD. Exhibit DD

Simpson Exhibit DD is a duplicate of the first 13 pages of Exhibit G. Avenal Power's position regarding Exhibit DD is the same as Avenal Power's position regarding Exhibit G: Avenal Power moves to strike Exhibit DD.

V. CONCLUSION

For the reasons discussed above, Avenal Power respectfully requests the Committee to strike the following documents from the testimony of Mr. Simpson: (1) the sections of Mr. Simpson's Rebuttal Testimony on the topics of alternatives and BACT requirements for PM₁₀ emissions; (2) Exhibits A through Z and AA through DD to the rebuttal

testimony of Mr. Simpson; and (3) Mr. Simpson's petition to intervene to the extent that Mr. Simpson purports to introduce it as testimony.

Respectfully,

/s/
Nicholas H. Rabinowitsh
Downey, Brand LLP
Attorney for Avenal Power Center, LLC

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**

**APPLICATION FOR CERTIFICATION FOR
THE AVENAL ENERGY PROJECT**

DOCKET NO. 08-AFC-1

PROOF OF SERVICE
(Revised 6/17/09)

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<p>Tracy Gilliland Avenal Power Center, LLC 500 Dallas Street, Level 31 Houston, TX 77002 tracy.gilliland@macquarie.com</p>	<p><u>INTERESTED AGENCIES</u></p> <p>California ISO 151 Blue Ravine Road Folsom, CA 95630 e-recipient@caiso.com Electronic Copy</p>	<p><u>ENERGY COMMISSION</u></p> <p>Jeffrey D. Byron Commissioner & Presiding Member jbyron@energy.state.ca.us</p>
<p><u>APPLICANT CONSULTANT</u></p> <p>Joe Stenger, Project Director TRC Companies 2666 Rodman Drive Los Osos, CA 93402 jstenger@trcsolutions.com</p>	<p><u>INTERVENORS</u></p> <p>Loulena A. Miles Marc D. Joseph Adams Broadwell Joseph & Cardozo 601 Gateway Boulevard, Suite 1000 South San Francisco, CA 94080 mdjoseph@adamsbroadwell.com lmiles@adamsbroadwell.com</p>	<p>Arthur Rosenfeld Commissioner and Associate Member arosenfe@energy.state.ca.us</p> <p>Gary Fay Hearing Officer gfay@energy.state.ca.us</p>
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Declaration of Service

I, Lois Navarrot, declare that on June 18, 2009, I served and filed copies of the attached **Avenal Power Center, LLC’s Motion to Strike Rebuttal Testimony of Intervenor Rob Simpson**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: www.energy.ca.gov/sitingcases/avenal. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service List) and to the Commission’s Docket Unit, in the following manner:

(check all that apply)

For Service to All Other Parties

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service List above to those addresses **NOT** marked “email preferred.”

AND

For Filing with the Energy Commission

- sending an original paper copy and one disk copy by hand delivery to the address below;

OR

- depositing in the mail an original and 12 paper copies as follow:

California Energy Commission
Attn: Docket No. 08-AFC-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct.

/s/
Lois Navarrot