

**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

**AVENAL POWER CENTER, LLC'S OBJECTION TO INTRODUCTION OF
TESTIMONY BY WITNESSES OF SIERRA CLUB, TEHIPITE CHAPTER**

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DATE June 29 2009

RECD. June 29 2009

June 29, 2009

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On June 26, 2009, Intervenor Sierra Club, Tehipite Chapter ("Sierra Club") and the Center on Race, Poverty & the Environment ("CRPE") filed their joint prehearing conference statement for the Avenal Energy Project ("Project") proceedings before the California Energy Commission ("Commission"). Along with the joint prehearing conference statement, Sierra Club also filed a document titled "Issue and Witness Identification." Sierra Club apparently plans to introduce the witnesses listed in the Issue and Witness Identification document at the evidentiary hearing.¹ This is inappropriate for two main reasons. First, testimony is long past due, and Sierra Club cannot remedy its failure to file written testimony by presenting new oral testimony at the hearing. Second, Sierra Club failed to submit anything other than a list of witnesses, in violation of the requirements pertaining to witnesses from the Notice of Prehearing Conference and Evidentiary Hearing for the Project. For these reasons, Avenal Power Center, LLC ("Avenal Power") objects to the introduction of the individuals named by Sierra Club. Avenal Power therefore respectfully requests the Avenal Application for Certification Committee (the "Committee") deny the proposed testimony of Sierra Club's witnesses.

¹ The "Issue and Witness Identification" document is signed and dated by John Honnette of Sierra Club. However, given that this document was submitted along with the joint prehearing conference statement, it is unclear whether the witnesses are intended to represent Sierra Club only, or Sierra Club and CRPE jointly. For the purposes of this objection, Avenal Power assumes the witnesses are intended to represent Sierra Club only.

I. SIERRA CLUB’S FAILURE TO SUBMIT TESTIMONY CANNOT BE REMEDIED BY PRESENTING NEW TESTIMONY AT THE HEARING.

California’s statutes pertaining to administrative proceedings give broad discretion to the presiding officer when conducting hearing proceedings. The Administrative Procedure Act (Cal. Govt. Code § 11340 et seq.) provides for procedures such as discovery, prehearing conferences, the production of documents or witnesses, and cross examination. (See Cal. Govt. Code §§ 11507.6, 11507.7, 11511.5, 11450.05-11450.50, and 11513[b].) The order of procedure rests with the hearing officer. (See *Ehrlich v. McConnell*, 214 Cal. App. 2nd 280, 287 [1963].)

The Commission has adopted detailed regulations and the Committee has issued orders that clearly outline the evidentiary rules for the Project proceedings. The Commission’s regulations allow the presiding member to “require that prepared written testimony or other evidence be submitted in advance of any hearing, for the purpose of facilitating the orderly consideration of issues at the hearing.” (20 C.C.R. § 1224[b].) This is precisely what the Committee has done in this case. The Revised Committee Scheduling Order for the Project issued by the Committee on April 24, 2009 clearly indicated the deadline for filing testimony, which was June 8, 2009. (Revised Committee Scheduling Order at 3.) The Committee drafted the schedule this way to ensure the parties would then be able to respond to the initial testimony via rebuttal testimony, which was due on June 15, 2009. This timeframe is consistent with the Administrative Procedure Act’s mandate that each party has the right to rebut the evidence against him or her. (See Cal. Govt. Code § 11513[b].)

The June 11, 2009 Committee order granting Sierra Club’s petition to intervene clearly indicated that “[t]he deadlines for conducting discovery in this case are past and other matters shall not be extended by the granting of these Petitions.” Sierra Club was informed of the schedule for the Project proceedings when it was granted intervenor status. Sierra Club had the opportunity to file rebuttal testimony on June 15, 2009, but it failed to do so. It could not be more clear that the deadline for submitting testimony has long passed, and the intervenors in this proceeding are not permitted to delay the proceedings due to their failure to respect the timeline for this case.

II. SIERRA CLUB FAILED TO FOLLOW THE PROPER PROCEDURES FOR INTRODUCING ITS WITNESSES.

The Notice of Prehearing Conference and Evidentiary Hearing requires each party to specify not only the identity of each witness offered by that party, but also a brief summary of the testimony to be offered by each witness, qualifications of each witness, and the time required to present the direct testimony by each witness. (Notice of Prehearing Conference and Evidentiary Hearing at 2.) Sierra Club failed to provide any of this information. As far as Avenal Power knows, Sierra Club is proposing to call six witnesses who will provide the following testimony: “Alternative energy producing technologies are able to efficiently provide electricity with much less GHG.” This vague assertion provides Avenal Power with almost no information regarding the specific nature of the testimony of the individual witnesses, and thus little opportunity to prepare any meaningful response to Sierra Club’s proposed testimony. As discussed above, the APA gives all parties the right to respond to evidence – a right that would be adversely affected if the Committee allows Sierra Club’s witnesses to testify at the hearing.

Sierra Club also failed to submit the required qualifications for each witness. Neither Avenal Power nor the Commission know anything about Sierra Club’s witnesses other than their names and the organizations they represent. Finally, Sierra Club failed to indicate how long it expects the testimony of these witnesses to take. In short, Sierra Club provided little more than a laundry list of names that fails to provide any meaningful information about the subject matter of the testimony or of the witnesses’ qualifications to address that subject matter. Avenal Power objects to the introduction of the listed individuals as witnesses because Sierra Club has failed to comply with the Commission's procedures for doing so.

III. THE COMMITTEE SHOULD NOT ALLOW SIERRA CLUB TO INTRODUCE TESTIMONY FROM ITS WITNESSES AT THE EVIDENTIARY HEARING.

As discussed above, Sierra Club has failed to introduce its witnesses and testimony as required by the Commission’s regulations and the Committee’s orders in this proceeding. Because allowing Sierra Club’s witnesses to testify at the evidentiary hearing would adversely

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PROOF OF SERVICE
(Revised 6/17/09)

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Declaration of Service

I, Shawn Prentiss, declare that on June 29, 2009, I served and filed copies of the attached **Avenal Power Center, LLC’s Objection To Introduction Of Testimony By Witnesses Of Sierra Club, Tehipite Chapter**. 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/ _____
Shawn Prentiss