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<b>DOCKET</b>	
<b>09-AFC-3</b>	
DATE	APR 07 2011
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STATE OF CALIFORNIA  
 State Energy Resources  
 Conservation and Development Commission

In the Matter of:                                     )  
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                                                               )  
Mariposa Energy Project                            )

Docket No. 09-AFC-3  
  
 PETITION FOR RECONSIDERATION  
 OF ENERGY COMMISSION’S  
 COMMITTEE ORDER

Intervener Rob Simpson hereby petitions the Commission for reconsideration of the  
 Committee’s Order of March 28, 2011, in the above referenced matter.

This petition is made on the ground(s) that:

1. The Commission Must Address Line 002 in Fulfilling Its Duties to Conduct  
 Application Proceedings in Compliance with the Public Resources Code and CEC  
 Regulations by Subpoenaing PG&E.
2. Hearing Officer engaged in prohibited ex parte communication with PG&E during the  
 hearing.

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STATE OF CALIFORNIA  
State Energy Resources  
Conservation and Development Commission

In the Matter of: ) Docket No. 09-AFC-3  
)  
)  
) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF PETITION  
) FOR RECONSIDERATION OF ENERGY  
) COMMISSION'S COMMITTEE ORDER  
Mariposa Energy Project )

Intervenor Rob Simpson hereby petitions the Commission for reconsideration of the Committee's Order of March 28, 2011, in the above referenced matter.

INTRODUCTION

During the March 7, 2011 evidentiary hearing conducted by Hearing Office Kenneth Celli, Intervenor Rob Simpson moved the Commission to subpoena PG&E to testify regarding the safety of the pipeline that will supply MEP, Line 002. (3/7/11 RT 337:5 – 338:11). Mr. Simpson argued that the witnesses that testified regarding pipe safety did not have specific knowledge of line 002 to be able to testify to its safety and, as the owner of the pipeline, PG&E is the proper party to address this issue. (3/7/11 RT 337:16 – 338:11).

Later in the hearing, Hearing Officer Celli called for a recess (3/7/11 RT 342:25) during which he engaged in ex parte communication with counsel for PG&E. (Declaration of Rob Simpson, ¶ 3-4.) It is apparent from the record following the recess that the Hearing Officer engaged in ex parte contact:

HEARING OFFICER CELLI: Okay. We are going to interrupt for a moment. Mr. Galati, if you wouldn't mind coming on up. That's Mr. Simpson's seat. Why don't you come on up here. Is this mike operable here to you, Mr. Petty? We have Scott Galati present. So if you could turn on the mike and identify yourself and why you're here, Mr. Galati.

MR. GALATI: My name is Scott Galati, and I represent PG&E.

HEARING OFFICER CELLI: Could you -- I don't know if you were aware, but there was a motion pending -- is my mike still working? There is a motion pending that the Committee subpoena a representative from PG&E to testify with regard to line 002 and we're going to ask if you have any information about that or in response to such a motion we'd like to hear from PG&E.

MR. SIMPSON: May I have a point of order? Two things, really. Was there ex parte communication between the Commission and Mr. Galati?

HEARING OFFICER CELLI: He's not a party. So the answer is no. Any other questions?

MR. SIMPSON: Yes. Has he been sworn?

HEARING OFFICER CELLI: No. He's not a witness.

MR. SIMPSON: He's --

MR. GALATI: In addition for the record, I'll clarify I was listening in my office. I was here earlier this morning. I don't know if you saw me lurking around. I was here earlier this morning and I was listening in my office. When I heard the issue of PG&E and subpoena, I got in my car and I've come to address that.

HEARING OFFICER CELLI: Please do.

(3/7/11 RT 343:6 – 344:13).

Prior to Hearing Officer Celli calling Mr. Galati to testify, Mr. Galati had had no involvement with the hearing. Hearing Officer Celli had to have engaged in ex parte contact

with Mr. Galati or he would not have known that Mr. Galati had something to say about the motion that Mr. Simpson had made minutes earlier.

Hearing Officer Celli allowed Mr. Galati to testify regarding Mr. Simpson's motion without swearing him as a witness even after Mr. Simpson inquired if Mr. Galati was to be sworn. (3/7/11 RT 344:4-5). Hearing Officer did not allow any of the parties to question Mr. Galati, responding to Intervenor Robert Sarvey's request to do so saying, "You know, something? He's here voluntarily. He's not a witness . . . He generously made himself available to talk to anyone afterwards and I think that's good as you're going to get here." (3/7/11 RT 346:22 – 347:4). Later in the hearing, Mr. Simpson challenged Hearing Officer Celli's actions to no avail:

MR. SIMPSON: Yes. Pursuant to 1216 of the Warren-Alquist Act and 11430.10 of the Government Code, I need to object to the determination that the Commission breaking from this hearing to meet with PG&E's attorney is not ex parte communication. PG&E has a profit motive –

HEARING OFFICER CELLI: Is PG&E a party?

MR. SIMPSON: Section --

HEARING OFFICER CELLI: No. My question is is PG&E a party?

MR. SIMPSON: PG&E has been referenced 124 times.

HEARING OFFICER CELLI: That's not an answer to my question. Is PG&E a party? Yes or no, Mr. Simpson.

MR. SIMPSON: I believe PG&E is a party. And 11430.10 doesn't say whether they're a party or not. It said while the proceeding is pending, there shall be no communication direct or indirect regarding any issue in a proceeding to the presiding officer from an employer or representative of an agency that's party or from an interested person outside the agency without notice and opportunity for all parties to participate in the communication. So you have communications from an interested person outside of the agency without notice for an opportunity for all parties to participate in the communication.

MR. WHEATLAND: Your Honor, could we take up the frivolous motions at the end of the hearing

HEARING OFFICER CELLI: Yes, we will.

(3/7/11 RT 381:10 – 382:11)

## ARGUMENT

### I. The Commission Must Address Line 002 in Fulfilling Its Duties to Conduct Application Proceedings in Compliance with the Public Resources Code and CEC Regulations by Subpoenaing PG&E

Mr. Simpson has established good cause to conduct additional evidentiary hearings to address the safety of Line 002. The interconnection to Line 002 is an integral part of the MEP project – a natural gas plant cannot operate without a source of natural gas. MEP and Line 002 safety, reliability, effect on the environment, and compliance with applicable law are interdependent and the Committee has been remiss in its duties in refusing to conduct a full analysis of Line 002 and its relationship with MEP. Such an inquiry cannot be conducted, of course, without participation by PG&E as the owner and operator of Line 002. The Committee acknowledged this need when it requested that PG&E participate in the evidentiary hearing. PG&E rebuffed the Committee's request, and after engaging in prohibited ex parte communication with PG&E, the Committee . To conduct a full analysis of Line 002 and its relationship with MEP, the Commission must PG&E has rebuffed the Committee's, must be subpoenaed.

“The purpose of an application proceeding is to ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level consistent with the need for such energy, and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality.” 20 C.C.R. § 1741. To this end, in evaluating applications for certification, the Commission is tasked with considering potential

environmental effects Pub. Res. Code 25523 ; 20 C.C.R. 1742 safety and reliability 25511, 1743; and compliance with applicable law 1744. This requires the Commission compile the necessary evidence by requesting and securing such information as is relevant and necessary in carrying out the purposes of the proceeding and issuing subpoenas and subpoenas duces tecum on its own authority or upon application of any party. 20 C.C.R. 1203.

The Committee argues that because “our licensing jurisdiction over related facilities such as fuel lines extends up to the first point of interconnection (Tit. 20 Cal.Code Regs. § 1702(n)),” its findings and conclusions with respect to the safety and reliability of MEP do not extend past the point of interconnection. The Committee seems to have confused the concept of regulatory jurisdiction with a limit on its powers and duty to investigate. This is akin to arguing that the Committee cannot, should not, and will not consider any endangered species issues because the U.S. Fish and Wildlife has regulatory jurisdiction over endangered species, not the Committee. This reasoning is, of course, flawed.

Mr. Simpson’s motion did not in any way call for the Commission to exercise any regulatory jurisdiction over Line 002, only to exercise its subpoena power to comply with its duties in evaluating certification applications. The Committee cites to no authority for the proposition that its duty to investigate and consider any pertinent issue is limited to the point of interconnection. At the same time, the Committee acknowledges that its analysis “includes the consideration of potentially significant impacts on the environment beyond our jurisdiction . . . Potentially significant impacts may include those effecting the public health and safety.” The Committee’s duty and power to investigate is not limited by any artificial boundaries, pipeline interconnections included.

The witnesses that testified regarding pipeline safety demonstrated their ignorance of basic facts regarding Line 002, thus showing themselves incompetent to testify as to the safety of Line 002.

Mr. Tyler admitted that he did not know: whether line 002 has automatic shut-off valves, where the shut-off valves are for line 002, how many power plants and large natural gas users are connected to line 002, if emergency personnel are aware of the location of the shutoff valves and how to operate these valves for line 002 (3/7/11 RT 316:4 – 21). Mr. Tyler also testified that he had not seen any information related to pressure fluctuations on line 002. (3/7/11 RT 354:19-21).

Mr. de Leon testified that he had not: done a risk analysis specifically for Line 002 (2/25/11 RT 259:17-19), physically inspected the pipeline where it's going to connect or any part of Line 02, looked at any records for Line 02, (2/25/11 RT 272:16 – 273:1), reviewed the pigging results on Line 002 (provided to the applicant by Robert Sarvey)(2/25/11 RT 250:15-25), or reviewed the maintenance records of Line 02 (2/25/11 RT 265:14-18).

Clearly, PG&E is needed to testify to the specific conditions of Line 002 and the Commission has a duty to gather this information.

## II. The Hearing Officer improperly engaged in prohibited ex parte contacts with PG&E during the hearing.

The Hearing Officer engaged in prohibited ex parte communication in violation of Government Code section 11430.10 et seq. and 20 CCR section 1216. Then, based on this communication, the Hearing Officer invited the party he had wrongly communicated with to offer testimony regarding the motion. The Hearing Officer allowed the witness to testify without

being sworn. The Hearing Officer then denied the parties the opportunity to question the witness despite a specific request to do so. When the Hearing Officer was challenged on the ex parte communication, the Hearing Office violated Government Code section 11430.50 by refusing to make the communication part of the record. Finally, the Committee wrongly relied on the contents of the ex parte communication and the unsworn testimony, not subject to cross examine, as justification for denying Mr. Simpson's motion.

CEC Regulations 20 CCR § 1216 endorse the prohibition on ex parte contacts in Government Code section 11430.10 et seq. as applicable to all adjudicative proceedings conducted by the commission. Government Code section 11430.10 clearly prohibits the behavior that took place at the March 7, 2011 hearing:

- (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
- (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.
- (c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

“While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private.” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal. 4th 1, 5 (Cal.



2006). Hearing Officer Celli engaged in this precise behavior and the Committee has further ratified this impermissible behavior by denying Mr. Simpson's motion.

DATED: April 7, 2011.

Respectfully

By: April Rose Sommer  
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APPLICATION FOR CERTIFICATION  
FOR THE **MARIPOSA ENERGY PROJECT**  
(MEP)

**Docket No. 09-AFC-3**

**PROOF OF SERVICE**  
(Revised 3/18/2011)

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