STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| Application for Certification for the Mariposa Energy Project | ) | Docket No. 09-AFC-03 |

# APPLICANT'S
# PREHEARING CONFERENCE STATEMENT

ELLISON, SCHNEIDER & HARRIS L.L.P.
Greggory L. Wheatland
Jeffery D. Harris
Samantha G. Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
(916) 447-2166 - Phone
(916) 447-3512 - Facsimile

January 25, 2011

Attorneys for Mariposa Energy, LLC

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| Application for Certification for the Mariposa Energy Project | ) | Docket No. 09-AFC-03 |

**APPLICANT'S**
**PREHEARING CONFERENCE STATEMENT**

On December 23, 2010, the Commission issued a Notice of Prehearing Conference and Evidentiary Hearing and Order. In response to this Notice, this Prehearing Conference Statement contains the following information:

1. ***The topic areas that are complete and ready to proceed to evidentiary hearing.***

   All topics are complete and ready to proceed to hearing.

2. ***The topic areas that are not complete and not yet ready to proceed to evidentiary hearing, and the reasons therefor.***

   None.

3. ***The topic areas that remain disputed and require adjudication, and the precise nature of the dispute for each topic.***

   a. As between the Staff and Applicant, no topic areas remain disputed and none require adjudication.

   b. Based on the Opening Testimony of Intervenors, the following topics are disputed by Intervenors:

      - **Land Use** – See the Opening Testimony of Dick Schneider on behalf of Bob Sarvey.

        The precise nature of the dispute surrounds the interpretation of Measure D, as incorporated into the East County Area Plan for the Alameda County General Plan. Alameda County, the Commission Staff and two prior Commission decisions have found that a power plant is a permissible use under Measure D. Mr. Schneider disagrees.

- **Socioeconomics** – See the Opening Testimony of Bob Sarvey and Rajesh Dighe.

  There are two disputes here:

  (1) The Commission Staff, the Staff of the Mountain House Community Services District ("MHCSD") and the Applicant have found that the MEP will not impact property values within the MHCSD. Mr. Dighe disagrees.

  (2) Under the label of "Socioeconomics", Mr. Sarvey argues that the MEP will have a negative financial impact on PG&E ratepayers and that "The CEC staff's analysis fails to identify, quantify, or mitigate this significant impact under CEQA to the ratepayers." Mr. Sarvey's arguments rehash arguments that he presented to the California Public Utilities Commission. Issues regarding ratepayer impacts are not within the jurisdiction of the California Energy Commission and are not relevant to this Application. Nor is the Commission required to consider ratepayer impacts under CEQA. Public Resources Code Section 21082.2 makes clear that "social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment" are outside the scope of CEQA. Therefore, while Mr. Sarvey may dispute the impact of MEP on ratepayers, this issue is outside the scope of this AFC proceeding.

- **Traffic and Transportation (Aviation)** – See the Opening Testimony of CalPilots.

  The FAA has determined that the Mariposa Energy Project ("MEP") and associated thermal plumes will pose no hazard to air navigation. Independent analysis by the Commission Staff and the Applicant confirms that with the mitigation measures proposed by Staff, the MEP will not adversely affect aviation or the Byron Airport. Mr. Wilson, a private pilot with no stated background, training or expertise in air safety analysis, disagrees.

c. Based on the Rebuttal Testimony of the Intervenors, additional topics may be disputed. However, the Applicant questions the propriety of a party raising a disputed issue for the first time in rebuttal testimony. Particularly where "rebuttal" testimony raises for the first time an issue that was not identified in a Party's Opening Testimony or Comments on the Staff Assessment, and where the "rebuttal" testimony does not identify with particularity the prior testimony it purports to rebut, the Applicant submits that the testimony is improper rebuttal and should not be received into evidence. Accordingly, the Applicant is filing a motion to strike the rebuttal testimony of certain parties, concurrent with the filing of this Prehearing Conference Statement.

In the event that the Committee does not grant the Applicant's motion to strike improper rebuttal testimony, the following additional topics may be disputed by the Intervenors:

- **Air Quality and GHG** (Sarvey Exhibits 403, 412, Sierra Club California/Schneider)

  On November 24, 2010 the BAAQMD issued an FDOC that concluded that the MEP will comply with applicable air quality regulations, including BACT and emission offset requirements. On December 16, 2010, the CEC Staff published its Supplemental Staff Assessment ("SSA") confirming the findings of the FDOC and incorporating the conditions in the FDOC into the SSA. Despite requesting and receiving additional time to file opening testimony, Mr. Sarvey did not address any air quality issues in his opening testimony. Sierra Club California also did not submit opening testimony on this issue. Instead, Mr. Sarvey and Sierra Club California attempt to raise a number of questions about air quality and green house gas emissions. Although the issues raised are matters of record in this proceeding, none of these concerns were raised in the Intervenors' opening testimony. For example, some of Mr. Sarvey's Rebuttal Testimony rehashes comments he presented on the Preliminary Determination of Compliance ("PDOC") in September 2010. These comments were considered by the Bay Area Air Quality Management District ("BAAQMD") in the Final Determination of Compliance ("FDOC") and many were found to be meritless. Mr. Sarvey simply looks to re-litigate issues addressed in the FDOC and, of greater significance in considering whether to strike these comments, provides no justification for failure to raise these concerns in opening testimony. The failure is unexcused.

- **Hazardous Materials** (Sarvey Exhibit 405, 413)

  In Exhibit 405 Mr. Sarvey addresses PG&E's Line 002, an existing natural gas pipeline located northeast of the project site. Not only was this matter not raised in Mr. Sarvey's Opening Testimony, it also addresses matters outside the jurisdiction of the CEC. The CEC has permit authority of the MEP up to the first point of interconnection with the PG&E gas system. Beyond the first point of interconnection, the California Public Utilities Commission ("CPUC") has exclusive jurisdiction. As confirmation that these issues are matters of CPUC jurisdiction, Mr. Sarvey also has submitted Exhibit 413 – an email regarding Line 002 from a CPUC proceeding. Therefore, Exhibits 405 and 413 are not relevant to this proceeding and should not be received into evidence.

- **Project Need and Alternatives** (Bill Powers/Sarvey Exhibit 406, Sarvey 408 and Sierra Club California/Mainland Exhibit 900)

In Exhibit 406, Mr. Powers offers testimony relating to project need and alternatives which was not raised in opening testimony. Similarly, in Exhibit 900 Mr. Mainland offers testimony relating to the need for the Project that was not raised in opening testimony.

Not only are Exhibits 406 and 900 improper rebuttal, but they also raise issues which are not relevant to this AFC proceeding. Accordingly, the Applicant has moved to strike this rebuttal testimony.

If this improper rebuttal testimony is allowed into evidence, the nature of the dispute seems to be these parties' belief that the MEP is not needed.

However, Senate Bill No. 110, which became Chapter 581, Statutes of 1999 repealed Public Resources Code sections 25523(f) and 25524(a) and amends other provisions relating to the assessment of need for new resources. SB 110 removed the requirement that, to certify a proposed facility, the Commission must make a specific finding that the proposed facility is in conformance with the adopted integrated assessment of need. Regarding need-determination, SB 110 states: "Before the California electricity industry was restructured the regulated cost recovery framework for powerplants justified requiring the commission to determine the need for new generation, and site only powerplants for which need was established. Now that powerplant owners are at risk to recover their investments, it is no longer appropriate to make this determination."[1]

Therefore, while various parties seek to dispute the need for MEP, and while these arguments may or may not be appropriate before the CPUC, as a matter of law, this proffered testimony is not relevant to this proceeding as it is no longer necessary, appropriate or permitted by existing law for the CEC to make this determination.

- **Worker Safety and Fire Protection** (Sarvey Exhibit 407)

  In Exhibit 407 Mr. Sarvey offers testimony on various worker safety and fire protection issues which he did not raise in his opening testimony.

  It is Mr. Sarvey's unsubstantiated opinion that the project should pay more to Alameda County and Tracy Rural Fire Department for "enhanced fire protection services". However, neither agency has offered evidence that such payments are necessary.

- **Environmental Justice** (Jass Singh)

[1] (Pub. Resources Code, § 25009, added by Stats. 1999, ch. 581, § 1.)

Mr. Singh offers testimony complaining that it is "unjust" to build a power plant in the "backyard" of the Mountain House community. Other than his unsubstantiated opinion, Mr. Singh offers no facts or evidence which constitute a dispute regarding environmental justice.

4. ***The identity of each witness sponsored by each party (note: witnesses must have professional expertise in the discipline of their testimony); the topic area(s) which each witness will present; a brief summary of the testimony to be offered by each witness; qualifications of each witness; the time required to present direct testimony by each witness; and whether the party seeks to have the witness testify in person or telephonically.***

The Applicant's witnesses, their topic areas, a brief summary of their testimony, and their qualifications are set forth in the Applicant's pre-filed testimony filed on December 20, 2010. A list of the Applicant's witnesses and their topic areas is attached hereto as Attachment 1.

As for direct examination, for any Applicant's witness who is not subject to cross-examination and for whom the Committee has no questions, the Applicant will move that the testimony be received by stipulation. For those witnesses who will be subject to cross-examination, the Applicant requests up to 10 minutes per witness, in order to identify the testimony the witness will sponsor and establish the witness' qualifications.

Because the Committee required all parties to submit opening and rebuttal testimony in writing, the Applicant believes that it would not be appropriate for any witness to provide additional substantive testimony on direct examination, unless expressly directed to do so by the Committee. All of Applicant's witnesses will be available to testify in person.

5. ***Topic areas upon which a party desires to cross-examine witnesses, a summary of the scope of each such cross-examination (including voir dire of any witness' qualifications), and the time desired for each such cross-examination.***

The Applicant does not desire to cross-examine any Staff witnesses.

For Intervenors' Opening Testimony, if no other party has cross examination for any Intervenor witnesses, then the Applicant waives cross and will accept the testimony by stipulation.

For Intervenors' Rebuttal Testimony, if the Applicant's Motion to Strike improper rebuttal is denied, and if no other party has cross examination for any Intervenor witnesses, then the Applicant waives cross and will accept the admission of the testimony into the evidentiary record by stipulation. However, it should be noted that Applicant does not accept as dispositive or correct any assertions contained in such testimony by virtue of such stipulation.

If any Intervenor testimony is not admitted by stipulation, then Applicant reserves the right for cross-examination and voir dire of the Intervenor's witness, based on the oral testimony that may be provided. In any case where intervenor testimony is not received by stipulation, Applicant's cross examination is estimated to be less than 30 minutes per witness. ***A list identifying exhibits and declarations that each party intends to offer into evidence and the technical topics to which they apply (as explained in the following section on Formats for Presenting Evidence).***

The Applicant's exhibit list is attached hereto as Attachment 2. Also attached hereto, as Attachment 3, is the Applicant's exhibit list by topic. The Declarations for each witness are attached to Applicant's pre-filed testimony, submitted December 20, 2010.

6. ***Topic areas for which the Applicant will seek a commission override due to public necessity and convenience pursuant to Pub. Res. Code § 25525.***

There are no topic areas for which the Applicant will seek a Commission override.

7. ***Proposals for briefing deadlines, impact of vacation schedules, and other scheduling matters.***

   (a) The briefing deadline has been set by the Committee. n.

   (b) The Committee's proposed schedule will have no impact on Applicant's vacation schedules.

   (c) Other scheduling matters.

      i. The Applicant is informed that certain elected officials may wish to address the Committee. The Applicant requests that the Committee specify a time on the morning of Monday, February 7, 2011 to receive public comment from elected officials.

      ii. To accommodate staff of Alameda and Contra Costa County, the Applicant requests that the Committee specify a time certain on the morning of Monday, February 7, 2011 to receive agency public comment on the subject of Land Use.

      iii. To accommodate witnesses who will be traveling from outside the local area, the Applicant requests that the Committee schedule the subject of aviation for the afternoon of Monday, February 7.

8. ***For all topics, the parties shall review the Proposed Conditions of Certification listed in the Supplemental Staff Assessment for enforceability, comprehension, and consistency with the evidence, and submit any proposed modifications.***

The Applicant concurs with the Conditions of Certification set forth in the Supplemental Staff Assessment.

January 25, 2011

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By: _____

Greggory L. Wheatland
Jeffery D. Harris
Samantha G. Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Mariposa Energy, LLC

# ATTACHMENT 1

## Applicant's Witnesses and Topic Areas

# ATTACHMENT 1

Applicant's Witnesses and Topic Areas

| TOPIC | WITNESS(ES) |
|---|---|
| Project Description | Garry Normoyle, Doug Urry |
| Electric Transmission | Randal Van Ess |
| Air Quality | Keith McGregor, Jerry Salamy |
| Biological Resources | Todd Ellwood |
| Cultural Resources | Clint Helton |
| Geological Resources | Dean Harris, Tom Lae |
| Hazardous Materials Handling | Jerry Salamy, Doug Urry |
| Land Use | David Blackwell, James Gwerder, Joshua Hohn, Adolph Martinelli |
| Noise and Vibration | Mark Bastasch |
| Paleontological Resources | Geoffrey Spaulding |
| Public Health | Keith McGregor, Jerry Salamy |
| Socioeconomics | Tom Priestley, Fatuma Yusuf |
| Soils | Jennifer Krenz-Ruark |
| Traffic and Transportation | Loren Bloomberg, Maly-Ann Bory |
| Traffic and Transportation - Aviation | Marshall Graves, Jr., Ronald Hess, Barbara Lichman, Keith McGregor, Douglas Moss, Gary Normoyle, Jerry Salamy, Stephen Shaw, Henry Shiu, Andrew Solberg, Doug Urry, C.P. "Case" van Dam, Wesley David Wardall, Barry Yurtis |
| Visual Resources | Joshua Hohn, Tom Priestly |
| Waste Management | Doug Urry |
| Water Resources | Matthew Franck |
| Worker Safety | Doug Urry |
| Alternatives | Doug Urry |

# ATTACHMENT 2

## Applicant's Tentative Exhibit List

## Organized by Exhibit Number

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814 - 1-800-822-6228 - WWW.ENERGY.CA.GOV

Docket Number: 09-AFC-03 Date: January 25, 2011

Project Name: Mariposa Energy Project

## TENTATIVE EXHIBIT LIST

| Exhibit | Brief Description | Offered | Admitted |
|---|---|---|---|
| 1 | Mariposa Energy Project Application for Certification (AFC); dated and docketed June 15, 2009.<br>(a) Project Description<br>(b) Electric Transmission<br>(c) Air Quality<br>(d) Biological Resources<br>(e) Cultural Resources<br>(f) Geologic Hazards and Resources<br>(g) Hazardous Materials Handling<br>(h) Land Use<br>(i) Noise and Vibration<br>(j) Paleontological Resources<br>(k) Public Health<br>(l) Socioeconomics<br>(m) Soils<br>(n) Traffic and Transportation<br>(o) Traffic and Transportation - Aviation<br>(p) Visual Resources<br>(q) Waste Management<br>(r) Water Resources<br>(s) Worker Health and Safety<br>(t) Alternatives | | |
| 2 | Mariposa Energy Project AFC Air Quality Dispersion Modeling Files; dated and docketed on June 15, 2009.<br>(a) Air Quality | | |
| 3 | Mariposa Energy Project AFC Health Risk Assessment Files; dated and docketed on | | |

| | | | |
|---|---|---|---|
| | June 15, 2009.<br>(a) Public Health | | |
| 4 | Applicant's Declarations and Testimony; dated and docketed on December 20, 2010.<br>(a) Project Description<br>(b) Electric Transmission<br>(c) Air Quality<br>(d) Biological Resources<br>(e) Cultural Resources<br>(f) Geologic Hazards and Resources<br>(g) Hazardous Materials Handling<br>(h) Land Use<br>(i) Noise and Vibration<br>(j) Paleontological Resources<br>(k) Public Health<br>(l) Socioeconomics<br>(m) Soils<br>(n) Traffic and Transportation<br>(o) Traffic and Transportation - Aviation<br>(p) Visual Resources<br>(q) Waste Management<br>(r) Water Resources<br>(s) Worker Health and Safety<br>(t) Alternatives | | |
| 5 | Supplement A – Data Adequacy Responses; dated and docketed on July 31, 2009.<br>(a) Project Description<br>(b) Electric Transmission<br>(c) Air Quality<br>(d) Biological Resources<br>(e) Cultural Resources<br>(f) Geologic Hazards and Resources<br>(g) Land Use<br>(h) Traffic and Transportation | | |
| 6 | Applicant's Supplement B - Additional Laydown Area Analysis; dated March 5, 2010 | | |

| | | | |
|---|---|---|---|
| | and docketed on March 8, 2010.<br>(a) Project Description<br>(b) Air Quality<br>(c) Biological Resources<br>(d) Cultural Resources<br>(e) Geologic Hazards and Resources<br>(f) Hazardous Materials Handling<br>(g) Land Use<br>(h) Noise and Vibration<br>(i) Paleontological Resources<br>(j) Public Health<br>(k) Socioeconomics<br>(l) Soils<br>(m) Traffic and Transportation<br>(n) Traffic and Transportation - Aviation<br>(o) Visual Resources<br>(p) Waste Management<br>(q) Water Resources<br>(r) Worker Health and Safety | | |
| 7 | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68; dated and docketed on November 30, 2009.<br>(a) Electric Transmission<br>(b) Air Quality<br>(c) Biological Resources<br>(d) Cultural Resources<br>(e) Geologic Hazards and Resources<br>(f) Soils<br>(g) Traffic and Transportation<br>(h) Traffic and Transportation – Aviation<br>(i) Waste Management<br>(j) Alternatives | | |
| 8 | Data Response Set 1C, Responses to CEC Staff Data Requests 2, 5, 8, 9, 48, 56, 59, 61, & 65; dated and docketed on February 12, 2010. | | |

| | | | |
|---|---|---|---|
| | (a) Electric Transmission<br>(b) Air Quality<br>(c) Cultural Resources | | |
| 9 | Robert Sarvey Data Response Set 1, Responses to Data Requests 1 through 8; dated and docketed on February 18, 2010.<br>(a) Air Quality<br>(b) Land Use | | |
| 10 | Rajesh Dighe Data Response Set 1, Responses to Data Requests 1 to 4; dated and docketed on March 8, 2010.<br>(a) Worker Heath and Safety<br>(b) Alternatives | | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff and Data Request 56; dated March 29, 2010 and docketed on April 1, 2010.<br>(a) Project Description<br>(b) Electric Transmission<br>(c) Air Quality<br>(d) Biological Resources<br>(e) Cultural Resources<br>(f) Geologic Hazards and Resources<br>(g) Hazardous Materials Handling<br>(h) Land Use<br>(i) Noise and Vibration<br>(j) Paleontological Resources<br>(k) Public Health<br>(l) Socioeconomics<br>(m) Soils<br>(n) Traffic and Transportation<br>(o) Traffic and Transportation - Aviation<br>(p) Visual Resources<br>(q) Waste Management<br>(r) Water Resources<br>(s) Worker Health and Safety | | |
| 12 | Data Response Set 2A, Responses to CEC Staff Data Requests 1 to 4; dated and | | |

| | | | |
|---|---|---|---|
| | docketed on April 12, 2010.<br>(a) Land Use | | |
| 13 | Rajesh Dighe Data Response Set 2, Responses to Data Requests 5 to 14; dated and docketed on May 4, 2010.<br>(a) Air Quality<br>(b) Land Use<br>(c) Socioeconomics | | |
| 14 | Robert Sarvey Data Response Set 2, Responses to Data Requests 9 to 37 and 39 to 44; dated and docketed on May 12, 2010.<br>(a) Air Quality<br>(b) Water Resources<br>(c) Worker Health and Safety<br>(d) Alternatives | | |
| 15 | Applicant's Staff Queries Set 1, Addenda to CEC Staff Data Request 52, Responses to Keith Frietas E-mail, CCC ALUC Letter, Hal Yeager Letter, and Contra Costa County Board of Supervisors Letter; dated and docketed on June 18, 2010.<br>(a) Public Health<br>(b) Traffic and Transportation - Aviation | | |
| 16 | Applicant's Staff Queries Set 2, Responses to Andrea Koch E-mail; dated and docketed on August 9, 2010.<br>(a) Traffic and Transportation - Aviation | | |
| 17 | BBID Recycled Water Feasibility Study - Draft Dated July 2001; dated July 2001 and docketed on August 23, 2010.<br>(a) Water Resources | | |
| 18 | BBID Recycled Water Policy - October 2001; dated October 12, 2001 and docketed on August 23, 2010.<br>(a) Water Resources | | |
| 19 | Alameda County 2002 Letter RE East Altamont Energy Center Consistency with Alameda County General Plan; dated April 26, 2002 and docketed on June, 22, 2010.<br>(a) Land Use | | |
| 20 | Letters from the California Department of Conservation to Mariposa Energy, LLC. Discussing the Williamson Act; dated and docketed on July 6, 2009.<br>(a) Land Use | | |

| | | | |
|---|---|---|---|
| 21 | Letter to A. Soloman Completion of Preliminary Review of Determination of Compliance / Authority to Construct; dated August 10, 2009 and docketed on August 13, 2009.<br>(a) Air Quality | | |
| 22 | CEC Response to Application for Confidentiality - Emission Reduction Credits; dated September 3, 2009 and docketed on September 10, 2009.<br>(a) Air Quality | | |
| 23 | Transition Cluster Phase I Interconnection Study; dated September 8, 2009 and docketed on September 9, 2009.<br>(a) Electric Transmission | | |
| 24 | Request for Waters of the U.S. Jurisdictional Determination; dated and docketed on September 29, 2009.<br>(a) Biological Resources | | |
| 25 | Email Regarding Data Response 56; dated November 9, 2009 and docketed on November 10, 2009.<br>(a) Electric Transmission | | |
| 26 | Notice of Need for Additional Time to Answer Staff Data Requests; dated and docketed on November 12, 2009.<br>(a) Electric Transmission<br>(b) Cultural Resources | | |
| 27 | Letter from Byron Bethany Irrigation District RE Background Information on the District; dated November 23, 2009 and docketed on November 24, 2009.<br>(a) Water Resources | | |
| 28 | USACE Wetland Delineation Amendment; dated and docketed on December 3, 2009.<br>(a) Biological Resources | | |
| 29 | U.S. Army Corps of Engineers Preliminary Determination; dated January 7, 2010 and docketed on November 16, 2010.<br>(a) Biological Resources | | |
| 30 | Report of Conversation (ROC) - Cultural Resources Survey of CEC 50-Foot Buffer Area; dated and docketed on January 15, 2010.<br>(a) Cultural Resources | | |
| 31 | Comments Regarding United States Army Corps of Engineers Wetland Delineation Amendment; dated and docketed on February 16, 2010. | | |

| | | | |
|---|---|---|---|
| | (a) Biological Resources | | |
| 32 | Objection to Data Request 4 of Robert Sarvey; dated and docketed February 18, 2010.<br>(a) Land Use | | |
| 33 | Additional Modeling Files Submitted to the BAAQMD for Comparison; dated and docketed on March 22, 2010.<br>(a) Air Quality | | |
| 34 | Applicant's Objections to Robert Sarvey Data Request Set 2; dated April 2, 2010 and docketed on April 5, 2010.<br>(a) Air Quality | | |
| 35 | Letter from Contra Costa Planning Commission; dated April 6, 2010 and docketed on April 28, 2010.<br>(a) Traffic and Transportation – Aviation | | |
| 36 | Clean Water Act Section 401 Water Quality Certification Application; dated April 7, 2010 and docketed on September 21, 2010.<br>(a) Biological Resources | | |
| 37 | Mariposa Energy, LLC Letter to CEC re MHCSD Resolution R-MMX-4 Opposing the Project; dated and docketed on April 8, 2010.<br>(a) Air Quality<br>(b) Public Health | | |
| 38 | ROC Between B. Jensen of Alameda County Planning Dept. & L. Worral re Projects Proposed in MEP Site Vicinity; dated April 15, 2010 and docketed on April 29, 2010.<br>(a) Visual Resources | | |
| 39 | DOD Letter to US Fish & Wildlife Services Regarding an Initiate Consultation; dated and docketed April 20, 2010.<br>(a) Biological Resources | | |
| 40 | Biological Assessment Transmittal to USFWS from CH2M Hill; dated and docketed April 20, 2010.<br>(a) Biological Resources | | |
| 41 | Consistency with Alameda County General Plan and Williamson Act Contracts; dated May 20, 2010 and docketed on May 21, 2010.<br>(a) Land Use | | |
| 42 | E-mail to B. Jensen on Land Use Clarification; dated and docketed on May 27, 2010. | | |

| | | | |
|---|---|---|---|
| | (a) Land Use | | |
| 43 | Clarification from B. Jensen on Maximum Building Intensity in the LPA Land Use Designation; dated and docketed June 18, 2010.<br>(a) Land Use | | |
| 44 | Responses to Information Requests for Formal Consultation; dated July 2, 2010 and docketed September 22, 2010.<br>(a) Biological Resources | | |
| 45 | Alameda Co. 2002 Letter RE Tesla Power Plan Consistency with Alameda Co. General Plan & Williamson Act Contracts; dated April 30, 2002 and docketed on July 6, 2010.<br>(a) Land Use | | |
| 46 | Preliminary Determination of Compliance; dated and docketed on August 18, 2010.<br>(a) Air Quality | | |
| 47 | Biological Resources Mitigation Supplemental Information; dated September 9, 2010 and docketed September 14, 2010.<br>(a) Air Quality | | |
| 48 | Wetland Clarifications from Doug Urry; dated September 17, 2010 and docketed September 20, 2010.<br>(a) Air Quality | | |
| 49 | Alameda County Letter - MEP Consistency with Alameda County General Plan; dated September 17, 2010 and docketed September 22, 2010.<br>(a) Land Use | | |
| 50 | Email Regarding MEP Noise Levels - Distance to 60 dBA; dated September 21, 2010 and docketed September 22, 2010.<br>(a) Noise and Vibration | | |
| 51 | Transition Cluster Phase II Interconnection Study Report - Greater Bay Area; dated September 22, 2010 and docketed November 1, 2010.<br>(a) Electric Transmission | | |
| 52 | Applicant's Comments on the Preliminary Determination of Compliance; dated September 27, 2010 and docketed September 28, 2010.<br>(a) Air Quality | | |
| 53 | Potential Bird Avoidance or Attraction to Exhaust Stacks and Thermal Plumes; dated July 27, 2010 and docketed September 28, 2010. | | |

| | | | |
|---|---|---|---|
| | (a) Biological Resources | | |
| 54 | Contra Costa County Comment Letter on Proposed Mariposa Energy Plant; dated October 4, 2010 and docketed October 12, 2010.<br>(a) Biological Resources | | |
| 55 | Letter Regarding Clarification of Water Supply with BBID; dated and docketed October 6, 2010.<br>(a) Water Resources | | |
| 56 | Email from Heather Beeler Regarding Golden Eagle Nests; dated October 13, 2010 and docketed December 7, 2010.<br>(a) Biological Resources | | |
| 57 | Applicant's Response to Public Comments Received on Preliminary Determination of Compliance; dated and docketed October 19, 2010.<br>(a) Air Quality | | |
| 58 | Updated MEP Biological Assessment Project Description and Conservation Measures and California Tiger Salamander and California Red-Legged Frog Relocation Plan; dated October 22, 2010 and docketed December 15, 2010.<br>(a) Biological Resources | | |
| 59 | Applicant's Response to Public Comments Received on Mariposa PDOC; dated November 4, 2010 and docketed November 8, 2010.<br>(a) Air Quality | | |
| 60 | MEP Burrowing Owl Survey Report; dated November 23, 2010 and docketed November 24, 2010.<br>(a) Biological Resources | | |
| 61 | Applicant's Comments on the CEC Staff Assessment; dated and docketed November 24, 2010.<br>(a) Electric Transmission<br>(b) Air Quality<br>(c) Biological Resources<br>(d) Hazardous Materials Handling<br>(e) Land Use<br>(f) Noise and Vibration<br>(g) Public Health<br>(h) Socioeconomics | | |

| | | | |
|---|---|---|---|
| | (i) Traffic and Transportation<br>(j) Traffic and Transportation - Aviation<br>(k) Visual Resources<br>(l) Water Resources | | |
| 62 | Bay Area Air Quality Management District Final Determination of Compliance; dated November 24, 2010 and docketed November 30, 2010.<br>(a) Air Quality<br>(b) Public Health | | |
| 63 | Byron Bethany Irrigation District's Comments on Mariposa Staff Assessment; dated and docketed November 28, 2010.<br>(a) Water Resources | | |
| 64 | Project Description Update for Proposed Water Supply and Natural Gas Pipelines; dated and docketed December 1, 2010.<br>(a) Project Description<br>(b) Water Resources | | |
| 65 | Responses to Staff Assessment Workshop Request for Data; dated and docketed December 7, 2010.<br>(a) Air Quality | | |
| 66 | Applicant's Proposed Addition to the Project Description to Include Water Conservation; dated December 9, 2010 and docketed December 13, 2010.<br>(a) Project Description<br>(b) Water Resources | | |
| 67 | Applicant’s Rebuttal Testimony; dated and docketed January 21, 2011.<br>(a) Land Use<br>(b) Socioeconomics | | |

# ATTACHMENT 3

## Applicant's Tentative Exhibit List

## Organized by Topic

**MARIPOSA ENERGY PROJECT**

**09-AFC-03**

**Applicant's Tentative Exhibit List by Topic**

1. Project Description

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1 and 2 |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Project Description Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Project Description Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 64 | Project Description Update for Proposed Water Supply and Natural Gas Pipelines, dated 12/1/2010, Docket ID 59119 | |
| 66 | Applicant's Proposed Addition to the Project Description to Include Water Conservation, dated 12/9/2010, Docket ID 59197 | |

2. Air Quality

| Exhibit | Brief Description | Specific Portion |
|---|---|---|

| | | | |
|---|---|---|---|
| 1 | | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Sections 2.0 and 5.1<br>Volume 2, Appendixes 5.1A, 5.1B, 5.1C, 5.1D, 5.1E |
| 2 | | Air Quality Dispersion Modeling Files, dated 6/15/2009, Docket ID 51995 | |
| 4 | | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Air Quality Section |
| 5 | | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Air Quality Section |
| 6 | | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 8 | | Applicants Data Response Set 1C, Responses to CEC Staff, Data Requests 2, 5, 8, 9, 48, 56, 59, 61 & 65, dated 2/12/2010, Docket ID 55375 | |
| 9 | | Robert Sarvey Data Response Set 1, Responses to Data Requests 1 Through 8, dated 2/18/10, Docket ID 55522 | |
| 11 | | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |

| | | | |
|---|---|---|---|
| 13 | | Rajesh Dighe Data Response Set 2, Responses to Dighe Data Requests 5 to 14, dated 5/4/2010, Docket ID 56543 | |
| 14 | | Robert Sarvey Data Response Set 2, Responses to Data Requests 9 to 37 and 39 to 44, dated 5/12/2010, Docket ID 56639 | |
| 21 | | Letter to A. Soloman Completion of Preliminary Review of Determination of Compliance / Authority to Construct, dated 8/10/2009, Docket ID 52866 | |
| 22 | | CEC Response to Application for Confidentiality - Emission Reduction Credits, dated 9/3/2009, Docket ID 53173 | |
| 33 | | Additional Modeling Files Submitted to the BAAQMD for Comparison, dated 3/22/2010, Docket ID 56009 | |
| 34 | | Applicant's Objections to Robert Sarvey Data Request Set 2, dated 4/2/2010, Docket ID 56114 | |
| 37 | | Mariposa Energy, LLC Letter to CEC re MHCSD Resolution R-MMX-4 Opposing the Project, dated 4/8/2010, Docket ID 56233 | |
| 46 | | Preliminary Determination of Compliance, dated 8/18/2010, Docket ID 58077 | |
| 52 | | Applicant's Comments on the Preliminary Determination of Compliance, dated 9/27/2010, Docket ID 58674 | |

| | | | |
|---|---|---|---|
| | 57 | Applicant's Response to Public Comments Received on Preliminary Determination of Compliance, dated 10/12/2010, Docket ID 58850 | |
| | 59 | Applicant's Response to Public Comments Received on Mariposa PDOC, dated 11/4/2010, Docket ID 58986 | |
| | 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Air Quality Section |
| | 62 | Bay Area Air Quality Management District Final Determination of Compliance, dated 11/24/2010, Docket ID 59081 | |
| | 65 | Responses to Staff Assessment Workshop Request for Data, dated 12/7/2010, Docket ID 59313 | |

3. Alternatives

| | **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|---|
| | 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 6.0 and 2 |
| | 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Alternatives Section |
| | 7 | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |

| | | | |
|---|---|---|---|
| | 10 | Rajesh Dighe Data Response Set 1, Responses to Data Requests 1 to 4, dated 2/18/2010, Docket ID 55798 | |
| | 14 | Robert Sarvey Data Response Set 2, Responses to Data Requests 9 to 37 and 39 to 44, dated 5/12/2010, Docket ID 56639 | |

4. Biological Resources

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.2<br>Volume 2, Appendixes 5.2A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Biological Resources Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Biological Resources Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 24 | Request for Waters of the | |

| | | | |
|---|---|---|---|
| | | U.S. Jurisdictional Determination, dated 9/29/2009, Docket ID 53456 | |
| 28 | | USACE Wetland Delineation Amendment, dated 12/3/2009, Docket ID 54380 | |
| 29 | | U.S. Army Corps of Engineers Preliminary Determination, dated 1/7/2010, Docket ID 59012 | |
| 31 | | Comments Regarding United States Army Corps of Engineers Wetland Delineation Amendment, dated 2/16/2010, Docket ID 55420 | |
| 36 | | Clean Water Act Section 401 Water Quality Certification Application, dated 9/21/2010, Docket ID 58578 | |
| 39 | | Letter to US Fish & Wildlife Services Regarding an Initiate Consultation, dated 4/20/2010, Docket ID 56408 | |
| 40 | | Biological Assessment Transmittal to USFWS from CH2M Hill, dated 4/20/2010, Docket ID 56415 | |
| 44 | | Responses to Information Requests for Formal Consultation, dated 7/2/2010, Docket ID 58577 | |
| 47 | | Biological Resources Mitigation Supplemental Information, dated 9/9/2010, Docket ID 58446 | |
| 48 | | Wetland Clarifications from Doug Urry, dated 9/17/2010, Docket ID 58547 | |
| 53 | | Potential Bird Avoidance or Attraction to Exhaust Stacks | |

| | | | |
|---|---|---|---|
| | | and Thermal Plumes, dated 9/28/2010, Docket ID 58638 | |
| 56 | | Email from Heather Beeler Regarding Golden Eagle Nests, dated 10/13/2010, Docket ID 59180 | |
| 58 | | Updated MEP Biological Assessment Project Description and Conservation Measures and California Tiger Salamander and California Red-Legged Frog Relocation Plan, dated 10/22/2010, Docket ID 59239 | |
| 60 | | MEP Burrowing Owl Survey Report, dated 11/23/2010, Docket ID 59088 | |
| 61 | | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Biological Resources Section |

5. Cultural Resources

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.3<br>Volume 2, Appendixes 5.3A, 5.3B, 5.3C, 5.3D, 5.3E |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Cultural Resources Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Cultural Resources Section |
| 6 | Applicant's Supplement B, | |

| | | | |
|---|---|---|---|
| | | Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 8 | | Applicants Data Response Set 1C, Responses to CEC Staff, Data Requests 2, 5, 8, 9, 48, 56, 59, 61 & 65, dated 2/12/2010, Docket ID 55375 | |
| 11 | | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 26 | | Notice of Need for Additional Time to Answer Staff Data Requests, dated 11/12/2009, Docket ID 54080 | |
| 30 | | Report of Conversation(ROC) - Cultural Resources Survey of CEC 50-Foot Buffer Area, dated 1/15/2010, Docket ID 54953 | |

6. Electric Transmission

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 3.0<br>Volume 2, Appendix 3A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Electric Transmission Section |
| 5 | Supplement A, Data | Electric |

| | | | |
|---|---|---|---|
| | | Adequacy, dated 7/31/2009, Docket ID 52651 | Transmission Section |
| 6 | | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 8 | | Applicants Data Response Set 1C, Responses to CEC Staff, Data Requests 2, 5, 8, 9, 48, 56, 59, 61 & 65, dated 2/12/2010, Docket ID 55375 | |
| 11 | | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 23 | | Transition Cluster Phase I Interconnection Study, dated 9/8/2009, Docket ID 53180 | |
| 25 | | Email Regarding Data Response 56, dated 11/9/2009, Docket ID 54037 | |
| 26 | | Notice of Need for Additional Time to Answer Staff Data Requests, dated 11/12/2009, Docket ID 54080 | |
| 51 | | Transition Cluster Phase II Interconnection Study Report - Greater Bay Area, dated 9/22/2010, Docket ID 58920 | |
| 61 | | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Electric Transmission Section |

7. Geologic Hazards and Resources

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.4 |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Geologic Hazards and Resources Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Geologic Hazards and Resources Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |

8. Hazardous Materials Handling

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.5<br>Volume 2, Appendixes 5.5A and 5.5B |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Hazardous Materials Handling |

| | | |
|---|---|---|
| | | Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Hazardous Materials Handling Section |

9. Land Use

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.6<br>Volume 2, Appendix 5.6A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Land Use Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Land Use Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 9 | Robert Sarvey Data Response Set 1, Responses to Data Requests 1 Through 8, dated 2/18/10, Docket ID 55522 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, | |

| | | | |
|---|---|---|---|
| | | dated 3/31/2010, Docket ID 56125 | |
| 12 | | Data Response Set 2A, Responses to CEC Staff Data Requests 1 to 4, dated 4/12/2010, Docket ID 56213 | |
| 13 | | Rajesh Dighe Data Response Set 2, Responses to Dighe Data Requests 5 to 14, dated 5/4/2010, Docket ID 56543 | |
| 19 | | Alameda County 2002 Letter RE East Altamont Energy Center Consistency with Alameda County General Plan, dated 4/26/2002, Docket ID 57282 | |
| 20 | | Letters from the California Department of Conservation to Mariposa Energy, LLC. Discussing the Williamson Act, dated 7/6/2009, Docket ID 52434 | |
| 32 | | Objection to Data Request 4 of Robert Sarvey, dated 2/18/2010, Docket ID 55518 | |
| 38 | | ROC Between B. Jensen of Alameda County Planning Dept. & L. Worral re Projects Proposed in MEP Site Vicinity, dated 4/12/2010, Docket ID 56472 | |
| 41 | | Consistency with Alameda County General Plan and Williamson Act Contracts, dated 5/20/2010, Docket ID 56771 | |
| 42 | | E-mail to B. Jensen on Land Use Clarification, dated 5/27/2010, Docket ID 56876 | |
| 43 | | Clarification from B. Jensen on Maximum Building | |

| | | | |
|---|---|---|---|
| | | Intensity in the LPA Land Use Designation, dated 6/18/2010, Docket ID 57216 | |
| 45 | | Alameda Co. 2002 Letter RE Tesla Power Plan Consistency with Alameda Co. General Plan & Williamson Act Contracts, dated 7/6/2010, Docket ID 57464 | |
| 49 | | Alameda County Letter - MEP Consistency with Alameda County General Plan, dated 9/17/2010, Docket ID 58582 | |
| 54 | | Contra Costa County Comment Letter on Proposed Mariposa Energy Plant, dated 10/4/2010, Docket ID 58754 | |
| 61 | | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Land Use Section |
| 67 | | Applicant's Rebuttal Testimony, dated 1/21/2011, Docket ID 59518 | Land Use Section |

10. Noise and Vibration

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.7 |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Noise and Vibration Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, | |

| | | |
|---|---|---|
| | Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 50 | Email Regarding MEP Noise Levels - Distance to 60 dBA, dated 9/21/2010, Docket ID 58576 | |
| 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Noise and Vibration Section |

11. Paleontological Resources

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.8 |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Paleontological Resources Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |

12. Public Health

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|

| | | | |
|---|---|---|---|
| 1 | | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.9<br>Volume 2, Appendix 5.9A |
| 3 | | Health Risk Assessment Files), dated 6/15/2009, Docket ID 51998 | |
| 4 | | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Public Health Section |
| 6 | | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 15 | | Applicant's Staff Queries Set 1, Addenda to CEC Staff Data Request 52, Responses to Keith Frietas E-mail, CCC ALUC Letter, Hal Yeager Letter, and Contra Costa County Board of Supervisors Letter, dated 6/18/2010, Docket ID 57232 | |
| 37 | | Mariposa Energy, LLC Letter to CEC re MHCSD Resolution R-MMX-4 Opposing the Project, dated 4/8/2010, Docket ID 56233 | |
| 46 | | Preliminary Determination of Compliance, dated 8/18/2010, Docket ID 58077 | |
| 61 | | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Public Health Section |
| 62 | | Bay Area Air Quality | |

| | | | |
|---|---|---|---|
| | | Management District Final Determination of Compliance, dated 11/24/2010, Docket ID 59081 | |

13. Socioeconomics

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.10<br>Volume 2, Appendixes 5.10A and 5.10B |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Socioeconomics Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 13 | Rajesh Dighe Data Response Set 2, Responses to Dighe Data Requests 5 to 14, dated 5/4/2010, Docket ID 56543 | |
| 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Socioeconomics Section |
| 67 | Applicant's Rebuttal Testimony, dated 1/21/2011, Docket ID 59518 | Socioeconomics Section |

14. Soils

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.11<br>Volume 2, Appendix 5.11A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Soils Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |

15. Traffic and Transportation

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.12 |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Traffic and Transportation Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Traffic and Transportation Section |

| | | |
|---|---|---|
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 38 | ROC Between B. Jensen of Alameda County Planning Dept. & L. Worral re Projects Proposed in MEP Site Vicinity, dated 4/12/2010, Docket ID 56472 | |
| 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Traffic and Transportation Section |

16. Traffic and Transportation – Aviation

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.12<br>Volume 2, Appendixes 5.12A and 5.12B |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Traffic and Transportation – Aviation Section |
| 5 | Supplement A, Data Adequacy, dated 7/31/2009, Docket ID 52651 | Traffic and Transportation Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | Data Response Set 1A & 1B, | |

| | | | |
|---|---|---|---|
| | | Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 11 | | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 15 | | Applicant's Staff Queries Set 1, Addenda to CEC Staff Data Request 52, Responses to Keith Frietas E-mail, CCC ALUC Letter, Hal Yeager Letter, and Contra Costa County Board of Supervisors Letter, dated 6/18/2010, Docket ID 57232 | |
| 16 | | Applicant's Staff Queries Set 2, Responses to Andrea Koch E-mail, dated 8/9/2010, Docket ID 57970 | |
| 35 | | Letter from Contra Costa Planning Commission, dated 4/6/2010, Docket ID 56441 | |
| 38 | | ROC Between B. Jensen of Alameda County Planning Dept. & L. Worral re Projects Proposed in MEP Site Vicinity, dated 4/12/2010, Docket ID 56472 | |
| 61 | | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Traffic and Transportation Section |

17. Visual Resources

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification | Volume 1, Section 5.13 |

| | | |
|---|---|---|
| | (AFC), dated 6/15/2009, Docket ID 51974 | Volume 2, Appendix 5.13A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Visual Resources Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Visual Resources Section |

18. Waste Management

| **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.14<br>Volume 2, Appendix 5.14A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Waste Management Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 7 | Data Response Set 1A & 1B, Responses to CEC Staff Data Requests 1 through 68, dated 11/30/2009, Docket ID 54287 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC | |

| | | | |
|---|---|---|---|
| | | Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |

19. Water Resources

| Exhibit | Brief Description | Specific Portion |
|---|---|---|
| 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.15<br>Volume 2, Appendix 5.15A |
| 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Water Resources Section |
| 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| 11 | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 14 | Robert Sarvey Data Response Set 2, Responses to Data Requests 9 to 37 and 39 to 44, dated 5/12/2010, Docket ID 56639 | |
| 17 | BBID Recycled Water Feasibility Study - Draft Dated July 2001, dated 7/2001, Docket ID 58129 | |
| 18 | BBID Recycled Water Policy - October 2001, dated 10/12/2001, Docket ID 58128 | |
| 27 | Letter from Byron Bethany Irrigation District RE Background Information on the District, dated 11/23/2009, Docket ID 54252 | |

| | | | |
|---|---|---|---|
| | 55 | Letter Regarding Clarification of Water Supply with BBID, dated 10/6/2010, Docket ID 58718 | |
| | 61 | Applicant's Comments on the CEC Staff Assessment, dated 11/24/2010, Docket ID 59083 | Water Resources Section |
| | 63 | Byron Bethany Irrigation District's Comments on Mariposa Staff Assessment, dated 11/28/2010, Docket ID 59069 | |
| | 64 | Project Description Update for Proposed Water Supply and Natural Gas Pipelines, dated 12/1/2010, Docket ID 59119 | |
| | 66 | Applicant's Proposed Addition to the Project Description to Include Water Conservation, dated 12/9/2010, Docket ID 59197 | |

20. Worker Health and Safety

| | **Exhibit** | **Brief Description** | **Specific Portion** |
|---|---|---|---|
| | 1 | Mariposa Energy Project's Application for Certification (AFC), dated 6/15/2009, Docket ID 51974 | Volume 1, Section 5.16 |
| | 4 | Applicant's Testimony; dated and docketed on 12/20/2010, Docket ID 59313 | Worker Health and Safety Section |
| | 6 | Applicant's Supplement B, Additional Laydown Area Analysis, dated 3/5/2010, Docket ID 55797 | |
| | 10 | Rajesh Dighe Data Response Set 1, Responses to Data Requests 1 to 4, | |

| | | | |
|---|---|---|---|
| | | dated 2/18/2010, Docket ID 55798 | |
| 11 | | Applicant's Data Response Set 1D, Responses to CEC Staff & Data Request 56, dated 3/31/2010, Docket ID 56125 | |
| 14 | | Robert Sarvey Data Response Set 2, Responses to Data Requests 9 to 37 and 39 to 44, dated 5/12/2010, Docket ID 56639 | |

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | Docket No. 09-AFC-03 |
| Application for Certification for the Mariposa Energy Project | ) | |
| | ) | |
| | ) | |

**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on January 25, 2011 I served copies of the attached *Applicant's Prehearing Conference Statement* by email and U.S. Mail to each party on the attached service list.

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

Karen A. Mitchell

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**
**1516 NINTH STREET, SACRAMENTO, CA 95814**
**1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION FOR THE *MARIPOSA ENERGY PROJECT* (MEP)**

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

***PROOF OF SERVICE***
**(Revised 1/20/2011)**

APPLICANT

Bo Buchynsky
Diamond Generating Corporation
333 South Grand Avenue, #1570
Los Angeles, California 90071
b.buchynsky@dgc-us.com

APPLICANT'S CONSULTANTS

Doug Urry
2485 Natomas Park Dr #600
Sacramento, CA 95833-2975
Doug.Urry@CH2M.com

COUNSEL FOR APPLICANT

Gregg Wheatland
Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
glw@eslawfirm.com

INTERESTED AGENCIES

California ISO
*E-mail Service Preferred*
e-recipient@caiso.com

INTERVENORS

Mr. Robert Sarvey
501 W. Grantline Road
Tracy, California 95376
Sarveybob@aol.com

*Edward A. Mainland
Sierra Club California
1017 Bel Marin Keys Blvd.
Novato, CA 94949
emainland@comcast.net

*Rob Simpson
27126 Grandview Avenue
Hayward CA. 94542
Rob@redwoodrob.com

California Pilots Association
c/o Andy Wilson
31438 Greenbrier Lane
Hayward, CA 94544
andy_psi@sbcglobal.net

Rajesh Dighe
395 W. Conejo Avenue
Mountain House, California 95391
dighe.rajesh@gmail.com

Morgan K. Groover
Development Director
Mountain House Community
Services District
230 S. Sterling Drive, Suite 100
Mountain House, CA 95391
mgroover@sjgov.org

Mr. Jass Singh
291 N. Altadena Street
Mountain House, California 95391
jass.singh2000@gmail.com

ENERGY COMMISSION

JEFFREY D. BYRON
Commissioner and Presiding Member
jbyron@energy.state.ca.us

ROBERT B. WEISENMILLER
Commissioner and Associate Member
rweisenm@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Kristy Chew
Advisor to Commissioner Byron
E-Mail Service preferred
kchew@energy.state.ca.us

Craig Hoffman
Siting Project Manager
choffman@energy.state.ca.us

Kerry Willis
Staff Counsel
kwillis@energy.state.ca.us

Jennifer Jennings
Public Adviser
*E-mail Preferred*
publicadviser@energy.state.ca.us

*indicates change

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| Application for Certification for the Mariposa Energy Project | ) | Docket No. 09-AFC-03 |

# APPLICANT'S MOTION TO STRIKE CERTAIN REBUTTAL TESTIMONY OF SARVEY, SIMPSON, CALPILOTS AND SIERRA CLUB CALIFORNIA

ELLISON, SCHNEIDER & HARRIS L.L.P.
Greggory L. Wheatland
Jeffery D. Harris
Samantha G. Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
(916) 447-2166 - Phone
(916) 447-3512 - Facsimile

Attorneys for Mariposa Energy, LLC

January 25, 2011

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| Application for Certification for the Mariposa Energy Project | ) | Docket No. 09-AFC-03 |

**APPLICANT'S MOTION TO STRIKE CERTAIN REBUTTAL TESTIMONY OF SARVEY, SIMPSON, CALPILOTS AND SIERRA CLUB CALIFORNIA**

Pursuant to Title 20, California Code of Regulations, Section 1716.5, Mariposa Energy Project, LLC ("Applicant') hereby moves to strike the following documents proffered as "rebuttal" testimony when they are in fact late-filed opening testimony, in contravention of the Committee's clear direction set forth in the Committee's Order of December 23, 2010 (the "Order"). The following documents present, for the first time, these Intervenors' positions in this case:

- Cal Pilot's Rebuttal Testimony
- The following exhibits submitted by Mr. Sarvey:
  - Exhibit 403 Mr. Sarvey's Air Quality Testimony.
  - Exhibit 405 Hazardous Materials Testimony
  - Exhibit 406 Alternatives Testimony (Bill Powers)
  - Exhibit 407 Worker Safety and Fire Protection Testimony
  - Exhibit 408 Alternatives Testimony
  - Exhibit 412 PSD Increment Consumption analysis Testimony
  - Exhibit 413 Hazardous Materials

- Sierra Club California
  - Rebuttal Testimony on Project Need and Alternatives - Edward Mainland
  - Rebuttal Testimony GHG - Dick Schneider
- Rob Simpson's Rebuttal Testimony

There is a fundamental and important difference between opening testimony or "direct testimony" versus rebuttal testimony. Opening testimony is each party's independent, affirmative testimony, and is not by definition responsive to the testimony of other parties.[1] Rebuttal testimony, in contrast, is testimony that affirmatively and specifically responds to the testimony or evidence of other parties. Lacking any clear link to any other party or parties' testimony, the proffered testimony is in contravention of the Order and should be struck.

Under the Commission's longstanding practice, consistent with the notion of fundamental fairness and due process, parties are expected to present their evidence on all relevant issues in their opening testimony. Presentation of parties' positions in their opening testimony is fundamental to ensuring that other parties have a reasonable and fair opportunity to respond to this testimony through rebuttal. If a party fails to present evidence in a timely manner through opening testimony, and instead, defers all or a substantial portion of its arguments on a topic to rebuttal, such conduct denies other parties the right to rebut this evidence.

As set forth below, this Motion to Strike each document is based on one or more of the following grounds:

(1) These documents are not proper rebuttal testimony because they do not specifically rebut any timely filed opening testimony. Instead, these documents are additional direct testimony which should have been filed no later than January 7, 2011. Allowing these documents into evidence at this late date in the proceeding would be highly prejudicial because the Applicant and other parties would not have an opportunity to respond to this new evidence.

(2) Some of these documents are not relevant to the Application for Certification ("AFC") of the Mariposa Energy Project ("MEP"), and raise issues that are outside the purview of the

[1] *Committee Order Denying Motion to Adopt the Committee's October 12, 2010 Schedule*, p. 1 Docket No. 09-AFC-03 (Dec. 8, 2010), *available at* http://www.energy.ca.gov/sitingcases/mariposa/notices/2010-12-08_Order_Denying_Sarvey_Request.pdf.

jurisdiction of the California Energy Commission ("Commission" or "CEC"), as more fully set forth below.

(3) Some of these documents are not sponsored by qualified witnesses.

## I. INTRODUCTION

The Committee's Scheduling Order of October 29, 2010 required Intervenors to file opening testimony by December 29, 2010, and to file rebuttal testimony by January 12, 2011. Intervenors complained that the interval between the issuance of the Supplemental Staff Assessment ("SSA") and the deadline to file opening testimony was too short to allow time for the preparation of Intervenor's opening testimony. Therefore, in a subsequent ruling, the Order granted Intervenors an extension of time, until January 7, 2011, to file opening testimony.[2] The Order stated that there would be no further continuances granted on this matter: "***FAILURE TO COMPLY WITH THE FILING REQUIREMENTS STATED IN THIS ORDER MAY PRECLUDE A PARTY FROM PARTICIPATING AT THIS HEARING."*** (Order, p. 4; emphasis in original.)

Despite the additional time provided by the Committee for the filing of Intervenors' opening testimony, the Intervenors filed very limited opening testimony. They now seek to cure this defect by styling their opening testimony as "rebuttal," in contravention of the Order.

Intervenors Sarvey, Simpson and CalPilots are sophisticated and experienced intervenors who, significantly, have practiced previously before this Commission. These parties are informed about and familiar with the Commission's practice and procedure, and often insist on the strict application of Commission rules to other parties when it suits their purposes. For example, in the San Francisco Electric Reliability Project proceeding, when the Applicant filed its Opening Brief fifty- three (53) minutes late, Mr. Sarvey filed a petition to strike the brief.[3] Mr. Sarvey claimed that a 53 minute delay was prejudicial and warranted striking the brief in its entirety. It is important to note that Mr. Sarvey objected to the late-filing of a brief – not testimony. Unlike testimony, no party has a right to prepare for or cross examine on the matters in a brief, which is, a statement of a party's positions on the record. It is not the record.

---

[2] *Order Granting Intervenors CalPilots and Rajesh Dighe's Petition for Minor Modifications to Project Schedule*, Docket No. 09-AFC-3 (Dec. 23, 2010), *available at* http://www.energy.ca.gov/sitingcases/mariposa/notices/2010-12-23_Order_Granting_Intervenors_Petition_Minor_Modifications_to_Project_Schedule.pdf.

[3] *Committee Ruling re: Joint Motion of CARE and Sarvey to Strike Opening Brief of Applicant*, Docket No. 04-AFC-01 (July 5, 2006), *available at* http://www.energy.ca.gov/sitingcases/sanfrancisco/documents/2006-07-05_RULING_CAREandSARVEY.PDF, citing to *Joint Motion of CARE and Intervenor Sarvey to Strike Opening Brief of Applicant*, p. 1 Docket No. 04-AFC-01 (June 26, 2006).

The Commission properly rejected Mr. Sarvey's motion to strike, noting that a 53 minute delay was not prejudicial.[4] In the instant case, however, we are not talking about a 53 minute delay. In this case, Mr. Sarvey, Mr. Simpson, CalPilots and Sierra Club California delayed for two weeks in filing testimony which is clearly opening testimony and which should have been filed on January 7, not January 21st. Similarly, both Sarvey and Simpson regularly claim violations of the Commission's regulations in their litigation seeking to set aside the decisions of the Commission.

In the instant case, the Applicant will be prejudiced if the Committee allows into evidence this late-filed opening testimony because the Applicant will not have had an opportunity to review and rebut this evidence. Intervenors have been on notice since October 29, 2010 that their opening testimony would be due following publication of the SSA, and that date was further extended to January 7, 2011. All of the matters set forth below could have and should have been included in their opening testimony, as the Order requires. The Applicant requests the Committee strike these documents.

## II. DISCUSSION

### A. The Commission should strike CalPilots' "Rebuttal" Testimony.

The rebuttal testimony of CalPilots should be stricken for two reasons.

First, CalPilots improperly utilizes rebuttal testimony as a vehicle to further advance arguments and evidence on matters previously submitted in the first part of CalPilots' own opening testimony, rather than to rebut testimony submitted by any other party. On January 8, 2011, CalPilots submitted only a portion of their opening testimony, which addressed the various facilities at the Byron Airport, aeronautical height limitations and thermal plumes, and the location of MEP in relation to the Byron Airport.[5] On January 21, 2011, CalPilots filed additional testimony, characterized as "rebuttal,"[6] but which, as stated above, did not respond specifically to any testimony submitted by other parties.

Instead, the CalPilots' rebuttal testimony expands upon and raises new arguments and contentions regarding findings of the Contra Costa ALUC, future growth at the Byron Airport, in addition to the expansion of arguments regarding thermal plumes and the location of the Byron Airport in relation to MEP, which were raised in CalPilots' own opening testimony. These

[4] *Committee Ruling re: Joint Motion of CARE and Sarvey to Strike Opening Brief of Applicant*, pp. 1-2. Docket No. 04-AFC-01 (July 5, 2006).

[5] See[ *Opening Testimony of California Pilots Association*, Docket No. 09-AFC-3 (Jan. 7, 2011). Furthermore, this testimony did not include a statement of qualifications.

[6] See *California Pilots Association (CALPILOTS) offers Rebuttal Testimony in opposition to the Mariposa Energy Project MEP*, Docket No. 09-AFC-3 (Jan. 21, 2011).

matters have been known to CalPilots for many months. The "rebuttal" simply offers further elaboration on these matters. CalPilots should not be permitted to file its opening testimony in two phases. It would be unfair for the Committee to allow CalPilots to submit this additional opening testimony in rebuttal because the Applicant is denied an opportunity to respond to these further allegations.

Second, the rebuttal testimony of CalPilots should be stricken because Mr. Wilson is not qualified to testify regarding these matters. To begin, a statement of qualifications was not timely submitted with CalPilots' opening testimony. Thereafter, a cursory statement of qualifications, containing less information than is typically presented in resumes or vita [or *curriculum vitae*], was not provided until January 21, 2011. Mr. Wilson's late filed statement of qualifications does not set forth any academic training, professional qualifications or experience regarding aviation safety, aeronautics or thermal plume analysis. The mere fact that he may be a pilot does not make him an expert on these matters, nor does his vague reference to employment related to power plant control systems qualify him to testify as an expert on aviation.

The Committee should not receive CalPilots' rebuttal testimony into evidence. The Applicant has no objection to receipt of this document as public comment.

### B. The Commission should strike Mr. Sarvey's rebuttal testimony.

Mr. Sarvey addressed only two topics in his opening testimony: land use and socioeconomics.[7] However, in his "rebuttal" testimony Mr. Sarvey submits for the first time new evidence and arguments on air quality, worker safety and fire protection, hazardous materials and alternatives, none of which were addressed at all in his opening testimony. As explained in further detail below, the Commission should strike these documents because they do not constitute proper rebuttal and in the case of PG&E's gas pipeline operations (Hazardous Materials) are not relevant to any decision this Commission must make in this AFC proceeding.

#### 1. *Exhibits 403 and 412, Mr. Sarvey's Air Quality Testimony.*

Mr. Sarvey submitted comments to BAAQMD on the PDOC for the MEP. Mr. Sarvey also submitted comments on the Staff Assessment regarding air quality. However, Mr. Sarvey filed no opening testimony whatsoever on Air Quality issues. Upon review of the District's response to his comments in the FDOC and Staff's review of the FDOC in the SSA, Mr. Sarvey did not contest the issuance of the FDOC or the Findings of the Staff Assessment. The re-submission of those comments as "testimony" at this late stage is simply an effort to re-litigate matters already decided in the FDOC, where his comments were considered and rejected.

The testimony that Mr. Sarvey should have filed as opening testimony, which for the most part rehashes comments he made on the PDOC, was instead labeled "Rebuttal Testimony" and filed two weeks after the deadline for filing Intervenor opening testimony. There is no

[7] See *Dick Schneider's Opening Testimony Land Use Sponsored by Robert Sarvey*, Docket No. 09-AFC-03 (Jan. 7, 2011) and *Robert Sarvey's Opening Testimony Socioeconomics*, Docket No. 09-AFC-03 (Jan. 7, 2011).

excuse for this conduct, especially from an experienced practioner before this Commission. The Committee's Order granted a further extension of time and expressly warned intervenors that the deadline for filing opening testimony was January 7, 2011 and that no further extensions would be granted. Mr. Sarvey is an experienced and highly compensated intervenor. He should be required to comply with the same rules that bind the Applicant, the Staff and other parties. As noted above, Mr. Sarvey believes that a brief – which is not evidence -- filed 53 minutes late should be stricken. Certainly then, testimony that is filed two weeks late should not be received into evidence.

### 2. *Exhibit 405 Hazardous Materials Testimony.*

Exhibit 405 addresses the operation of PG&E gas pipelines beyond the first point of interconnection with the MEP. The Applicant objects to this testimony on three grounds.

First, the testimony is not proper rebuttal. The testimony does not identify previously filed testimony which it purports to rebut. This is not surprising, given the Commission permitting extends to the first point of interconnection and not beyond, as Sarvey suggests. The proffered testimony addresses matters which are outside the jurisdiction of the CEC. The CEC has jurisdiction only up to the first point of interconnection with the PG&E gas pipeline system.[8] Questions regarding the operation of the PG&E gas pipeline system are exclusively subject to the jurisdiction of the CPUC.

Second, even assuming without conceding that these matters relate to any decision the Commission must make in this proceeding, the late-filed testimony addresses issues that could have and should have been presented in Mr. Sarvey's opening testimony. Mr. Sarvey's testimony is factually incorrect in many material respects. By offering this testimony as rebuttal, Mr. Sarvey seeks to deny the Applicant, the Staff and other parties an opportunity to rebut these factual inaccuracies.

Third, Mr. Sarvey has not established that he is qualified to testify regarding the operation of the PG&E gas pipeline system. Mr. Sarvey has offered no academic training, professional experience or other qualifications regarding the operation of gas pipelines.

Therefore, this testimony should not be received into evidence.

### 3. *Exhibit 406 Alternatives Testimony (Bill Powers).*

The testimony of Bill Powers is another document which is not proper rebuttal. All of the matters set forth in this testimony are matters which Mr. Sarvey and Mr. Powers could have and should have introduced in their opening testimony. The first sentence of this document

[8] Cal. Public Resources Code § 25500; *also see* 20 C.C.R.§ 1702(n) (defining "related facility" to include "transmission and fuel lines up to the first point of interconnection").

states that "My testimony addresses viable, non-combustion turbine alternatives to the proposed Mariposa Energy Project (MEP)..." This is precisely the type of testimony which the Committee advised Mr. Sarvey must be submitted as opening testimony. He ignored the Order's clear direction.

Mr. Power's testimony here is very similar to testimony which he provided as opening testimony in the Chula Vista Energy proceeding and in the Ivanpah proceeding. Because Mr. Power's testimony was submitted as opening testimony in those proceedings, other parties were afforded a reasonable opportunity to review and rebut his testimony. Further, in the case of the Ivanpah proceeding, Mr. Powers had certain proffered testimony struck as it was not in compliance with the Committee's order in that proceeding.[9] As in the Ivanpah case, there is simply no possible excuse here for failing to comply with the Order by withholding Mr. Powers' opening testimony and late filing it as "rebuttal."

Because Mr. Power's testimony is largely matters of opinion, rather than matters of fact, the Applicant does not object to receipt of this document as public comment, as the Committee allowed in the Ivanpah proceeding.[10]

**4. *Exhibit 407 Worker Safety and Fire Protection Testimony.***

In Exhibit 407, Mr. Sarvey presents his research on other gas-fired power plants and presents recommendations for additional conditions of certification. This is a classic example of opening testimony. He does not purport to rebut the testimony of others. He is presenting his own, independent and affirmative recommendations. However, because this document was submitted as rebuttal it must not be received into evidence. To hold otherwise would deny the Applicant and other parties an opportunity to respond to this testimony.

The Applicant also objects to the testimony on the grounds that Mr. Sarvey is not qualified to testify as an expert on matters of plant operations and safety. The Applicant has no objection to receiving this testimony as public comment.

**5. *Exhibit 408 Alternatives Testimony of Robert Sarvey; Project Need and Alternatives – Testimony of Edward Mainland.***

The Applicant objects to these exhibits on two grounds.

First, these documents should have been submitted as opening testimony. There is nothing in these documents that rebut other parties' opening testimony.

[9] Ivanpah Hearing Transcripts, March 22, 2010, pp. 11-17.

[10] Ivanpah Hearing Transcripts, March 22, 2010, p. 193.

Second, as set forth in Applicant's PHC Statement, the Legislature has expressly declared that questions regarding project "need" and the integrated assessment of need are not relevant to this proceeding.[11]

#### 6. *Exhibit 413 Hazardous Materials.*

The Applicant objects to Exhibit 413 on three grounds, similar to the grounds for rejecting Exhibit 405. First, the testimony should have been filed as opening testimony, for the same reasons set forth regarding Mr. Sarvey's other "rebuttal" documents. In this testimony, Mr. Sarvey is offering new evidence based on his own research; he is not rebutting the testimony of other parties.

Second, as set forth in Applicant's PHC statement, this testimony regarding PG&E pipelines is not relevant to this proceeding. The operation of PG&E's gas pipeline system beyond the first point of interconnection with the MEP is exclusively the jurisdiction of the CPUC.

Third, Mr. Sarvey is not qualified to testify as an expert regarding gas pipeline operations.

The Applicant does not object to receipt of this document as public comment.

### C. The Commission should strike the rebuttal testimony of Sierra Club California.

Sierra Club California, which did not offer any opening testimony at all, now offers testimony styled as "rebuttal" on project need, alternatives and greenhouse gas. This testimony should be struck.

#### 1. *GHG - Dick Schneider*

Mr. Schneider submitted opening testimony on behalf of Mr. Sarvey on the subject of land use, demonstrating that Mr. Schneider understands the difference between opening and rebuttal testimony.

If Mr. Schneider wished to address the topic of greenhouse gas, he should have submitted this testimony as opening testimony. Mr. Schneider's GHG testimony contains serious factual errors. If the testimony were received as rebuttal, the Applicant would be denied an opportunity to rebut these errors. This testimony should be stricken. The Applicant has no objection to the receipt of this document as public comment.

[11] See *Applicant's Prehearing Conference Statement*, Docket No. 09-AFC-03 p. 5 (Jan. 25, 2011).

### D. The Commission should strike the rebuttal testimony of Intervenor Rob Simpson.

Mr. Simpson, who also offered no opening testimony, submitted "rebuttal" testimony which did not rebut previously filed testimony, but which instead offered to support unspecified portions of other rebuttal testimony. The Applicant moves to strike Rob Simpson's rebuttal testimony on the grounds that it is not proper rebuttal testimony.

This testimony admits, on its face, that it is not rebuttal testimony. It does not expressly rebut previously filed testimony. Instead, Mr. Simpson's testimony "agrees" with unspecified portions of other parties' rebuttal testimony.[12]

The testimony further "agrees" with a document entitled "The Effect of Power Plants on Local Housing Values and Rents" posted on the documents page for this proceeding." This document was posted on the CEC website on October 12, 2010, and is dated May 2010.[13] Therefore, if Mr. Simpson desired to address this document or otherwise opine on land use and property value questions, he should have filed these opinions as opening testimony, just as Mr. Dighe did.

Mr. Simpson may "agree" with other, properly filed testimony in his brief. Agreement here is, at best, repetitive, adding nothing to the evidentiary record. The exclusion of his agreement causes no prejudice or harm.

Mr. Simpson may argue that he only recently intervened in this proceeding and such recent intervention should excuse him from filing opening testimony. Not so. The order granting Mr. Simpson intervenor status expressly provides "The deadlines for conducting discovery and other matters shall not be extended by the granting of these Petitions." Therefore, the order granting Mr. Simpson intervenor status did not extend his deadline for filing opening testimony.

Mr. Simpson's testimony is the classic example of improper rebuttal. The Committee should not receive this testimony into evidence. The Applicant has no objection to the receipt of this document as public comment.

## III. CONCLUSION

We recognize that the Commission's rules of evidence are liberally construed, and that the Commission has sometimes given inexperienced practitioners latitude in defining permissible rebuttal. These are not inexperienced practioners. All four have practiced before this Commission, as they set forth in their petitions to intervene. Sarvey and Simpson regularly engage in litigation against this Commission's decisions, and some division of the Sierra Club is

[12] See *Rebuttal Testimony of Rob Simpson*, Exhibit 1000, Docket No. 09-AFC-03 (Jan, 21, 2011).

[13] http://www.energy.ca.gov/sitingcases/mariposa/documents/index.html#other.

currently engaged in litigation against at least one large-scale solar project approved by the Commission.

If the difference between opening and rebuttal testimony is to have any meaning at all, the Commission must draw the line somewhere. The Commission clearly drew the line in the Order, admonishing these sophisticated intervenors to participate in a manner consistent with the Order. A party has crossed this line where, as here, (1) the party fails to offer any opening testimony on a topic and reserves all of its evidence and argument for rebuttal, (2) the purported "rebuttal" testimony does not specifically rebut any prior testimony, but instead raises arguments or issues which could have been raised in opening testimony, and (3) where the alleged "rebuttal" testimony is offered to support, not rebut, the testimony of other parties.

Despite the fact that intervenors have had been on notice since October that their opening testimony would be due in December and despite the fact that the Committee provided a further extension of time to January for them to do so, these intervenors filed very limited opening testimony. Instead, these intervenors withheld their opening testimony on a wide variety of topics and submitted this opening testimony under the guise of rebuttal. Mr. Sarvey, Mr. Simpson, Mr. Powers, and Mr. Schneider are sophisticated and experienced intervenors. There is no excuse for their flaunting the Commission's rules and the Order of the Committee. All of the aforementioned should not be received into evidence as testimony. The proffer to accept certain testimony as public comment should suffice.[14]

January 25, 2011

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By: 

Greggory L. Wheatland
Jeffery D. Harris
Samantha G. Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Mariposa Energy, LLC

[14] If any of the aforementioned testimony is received in evidence, the Applicant respectfully requests the right to file sur-rebuttal by January 31, 2011 before the evidentiary hearings to commence February 7, 2011.

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | Docket No. 09-AFC-03 |
| Application for Certification for the Mariposa Energy Project | ) | |
| | ) | |
| | ) | |

**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on January 25, 2011 I served copies of the attached *Applicant's Motion to Strike Certain Rebuttal Testimony of Sarvey, Simpson, CalPilots, and Sierra Club California* by email and U.S. Mail to each party on the attached service list.

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

Karen A. Mitchell

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**
**1516 NINTH STREET, SACRAMENTO, CA 95814**
**1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION FOR THE *MARIPOSA ENERGY PROJECT* (MEP)**

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

***PROOF OF SERVICE***
**(Revised 1/20/2011)**

APPLICANT

Bo Buchynsky
Diamond Generating Corporation
333 South Grand Avenue, #1570
Los Angeles, California 90071
b.buchynsky@dgc-us.com

APPLICANT'S CONSULTANTS

Doug Urry
2485 Natomas Park Dr #600
Sacramento, CA 95833-2975
Doug.Urry@CH2M.com

COUNSEL FOR APPLICANT

Gregg Wheatland
Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
glw@eslawfirm.com

INTERESTED AGENCIES

California ISO
*E-mail Service Preferred*
e-recipient@caiso.com

INTERVENORS

Mr. Robert Sarvey
501 W. Grantline Road
Tracy, California 95376
Sarveybob@aol.com

*Edward A. Mainland
Sierra Club California
1017 Bel Marin Keys Blvd.
Novato, CA 94949
emainland@comcast.net

*Rob Simpson
27126 Grandview Avenue
Hayward CA. 94542
Rob@redwoodrob.com

California Pilots Association
c/o Andy Wilson
31438 Greenbrier Lane
Hayward, CA 94544
andy_psi@sbcglobal.net

Rajesh Dighe
395 W. Conejo Avenue
Mountain House, California 95391
dighe.rajesh@gmail.com

Morgan K. Groover
Development Director
Mountain House Community
Services District
230 S. Sterling Drive, Suite 100
Mountain House, CA 95391
mgroover@sjgov.org

Mr. Jass Singh
291 N. Altadena Street
Mountain House, California 95391
jass.singh2000@gmail.com

ENERGY COMMISSION

JEFFREY D. BYRON
Commissioner and Presiding Member
jbyron@energy.state.ca.us

ROBERT B. WEISENMILLER
Commissioner and Associate Member
rweisenm@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Kristy Chew
Advisor to Commissioner Byron
E-Mail Service preferred
kchew@energy.state.ca.us

Craig Hoffman
Siting Project Manager
choffman@energy.state.ca.us

Kerry Willis
Staff Counsel
kwillis@energy.state.ca.us

Jennifer Jennings
Public Adviser
*E-mail Preferred*
publicadviser@energy.state.ca.us

*indicates change