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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:	)	Docket No. 09-AFC-3
	)	
	)	PETITION FOR RECONSIDERATION
	)	OF THE COMMISSION'S
	)	MAY 18, 2011 WRITTEN ORDER
Mariposa Energy Project	)	

Intervenor Rob Simpson hereby petitions the California Energy Commission for reconsideration of its May 18th, 2011 written order approving the Mariposa Energy Project, in the above referenced matter, pursuant to California Code of Regulations, title 20, section 1716.5 and 1720. This petition is made on the ground(s) that:

1. The Commission has failed to abide by the Warren-Alquist Act rules of procedures governing motions.
2. The written order fails to address pipeline safety and reliability.
3. The presiding officer of the MEP Committee engaged in prohibited ex parte communication in violation of Government Code section 11430.10 et seq. and California Code of Regulations, title 20, section 1216 and should have been removed from this position.
4. The written order does not comply with all "LORS" – all applicable laws, ordinances, regulations, and standards – as required by Public Resources Code, sections 25525 and 25523, subd. (d)(1).

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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 MOTION
	)	FOR RECONSIDERATION OF THE
	)	COMMISSION'S MAY 18, 2011 WRITTEN
	)	ORDER
Mariposa Energy Project	)	

Intervenor Rob Simpson hereby petitions the California Energy Commission for reconsideration of its May 18th, 2011 written order approving the Mariposa Energy Project, in the above referenced matter, based on the following.

ARGUMENT

I. THE COMMISSION HAS FAILED TO ABIDE BY THE WARREN-ALQUIST ACT RULES OF PROCEDURES GOVERNING MOTIONS

In failing to respond to prior motions by Mr. Simpsons, the Commission has violated the Warren-Alquist Act and Public Resources Code. The Commission also impermissibility ruled on the PMPD without addressing an outstanding motion by Mr. Simpson that implicated the content of the PMPD, and the Commission failed to fully address pipeline safety and reliability in its written order.

During the March 7, 2011 evidentiary hearing conducted by Hearing Office Kenneth Celli, Intervenor Rob Simpson moved the Commission to subpoena Pacific Gas & Electric Company

("PG&E") to testify regarding the safety of its 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). Commissioner Karen Douglas, the presiding member on the MEP committee, issued a written order March 28, 2011 denying Mr. Simspon's motion. Mr. Simpson filed a motion for reconsideration of this order April 8, 2011. To date, this motion has yet to be addressed by the Commission or its staff in any manner.

During the May 18th, 2011 Commission hearing on the PMPD, the Commission asked Hearing Officer Celli to address Mr. Simpson's unaddressed Motion for Reconsideration. The Hearing Officer responded with a misstatement of the truth of the matter apparently for the purpose of claiming that Mr. Simpson's motion had been entirely ignored because it had not been timely filed. Hearing Officer claimed that the motion had been denied during the March 7th hearing when it was actually denied in a written order dated March 28th .

> MR. LEVY[1]: Yes. There was a motion for reconsideration that was a rather confused motion because it was brought to the Commission for a reconsideration of a Committee decision. The Committee's decision was not to subpoena PG&E. Let me step back and give you a little more background. The motion was brought at about 7:30 at night on the third and last day of our evidentiary hearings for a representative from PG&E to come and testify. Mr. Galati, who represents PG&E, came. We asked and he stated that he would resist those efforts and so at that time the motion was denied, I believed, on the 7th of March which was the date of our last hearing. A subsequent motion for reconsideration went to the Commission to reconsider the Committee's decision and that was sent up to Chief Counsel's office, pursuant to our procedures, and the determination I believe was that it was going to be denied by the expiration of time.

(5/18/11 RT 166:15-167:8.)

1. The transcript incorrectly identifies Hearing Officer Kenneth Celi here as Mr. Levy, demonstrated by the preceding line that references "Ken." "CHAIRMAN WEISENMILLER: Thank you. I guess the other was I'd ask Ken to address was the motion for reconsideration." (5/18/11 RT 166:12-14.)

Strangely, although she herself had written the written order denying Mr. Simpson's original motion, Commission Douglas did nothing to correct the Hearing Officer's misstatements of fact regarding the motion being denied during the March 7th hearing. The Commission also apparently did not take note of Mr. Simpson's counsels careful recitation of the facts during her comment a few minutes earlier in the hearing: "During the March 7, 2011 evidentiary hearing, Mr. Simpson moved the committee to exercise its right to subpoena PG&E for the purposes of soliciting evidence on line 002. The Committee declined to address the motion during the hearing." (5/18/11 RT 145:18-23.)

Mr. Simpson's April 8, 2011 motion was most certainly filed within 30 days of the March 28, 2011 order. Even if there was a question of missed deadlines, this does not absolve the Commission's legal responsibility pursuant to California Code of Regulations, title 20, sections 1716.5. or 1720 to grant or deny Mr. Simpson's motion within 30 days. The Commission has no right to simply ignore motions it doesn't feel like dealing with.

> Any party may file a motion or petition with the presiding member regarding any aspect of the notice or application proceeding. Responses to the petition by other parties shall be filed within 15 days of the filing of the petition unless otherwise specified by the presiding member. The presiding member may set a hearing to consider argument on the petition, and shall, within 30 days of the filing of the petition, act to grant or deny the petition, in whole or in part, or schedule further hearings or written responses on the petition.

(Cal. Code Regs., tit. 20, § 1716.5.)

> Within 30 days after a decision or order is final, the Commission may on its own motion order, or any party may petition for, reconsideration thereof . . . The commission shall hold a hearing for the presentation of arguments on a petition for reconsideration and shall act to grant or deny the petition within 30 days of its filing. In the absence of an affirmative vote of three members of the commission to grant the petition for reconsideration, the petition shall be denied.

(Cal. Code Regs., tit. 20, § 1720.)

The Hearing Officer also tried to imply that this motion was somehow flawed because it was requesting consideration of a committee motion. Section 1720 does not limit its applicability to only certain motions and certainly applies to a final order issued by a Commissioner.

II. THE WRITTEN ORDER DOES NOT SUFFICIENTLY ADDRESS PIPELINE SAFETY AND RELIABILITY

The written order must be prepared "based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application" and "shall contain reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision." (Cal. Code Regs., tit. 20, § 1751.) The written order approving this project must include "specific provisions relating to the manner in which the proposed facility is to be designed, sited, and operated in order to protect environmental quality and assure public health and safety." (Pub. Resources Code, § 25523.) Natural gas pipelines most certainly threaten environmental quality and public health and safety and the written order does not include sufficient bases for the conclusion that there are no issues of pipeline safety or reliability of Line 002 and the planned interconnection. To accomplish this, the Commission must reconsider its written order approving this project, reopen the evidentiary hearings, and subpoena PG&E to give testimony on the safety and reliability of Line 002.

In addition to violating the Public Resources Code and Commission regulations, the Commission has ignored its own directive that all siting cases include review of pipeline safety and reliability. At the March 9, 2011 CEC Business Meeting, Chairman Weisenmiller directed staff to include consideration of pipeline safety and reliability issues in their review of current and future siting cases. Just a few weeks later, the Comission denied Mr. Simpson's motion requesting that the Commission subpoena PG&E, the owner and operator of the natural gas pipeline Line 002 that will supply MEP, to give testimony on pipeline safety and reliability issue in this siting case. As Chairman

Weisenmiller has himself confirmed, 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.

"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." (California Code of Regulation, tit. 20, § 1741.) To this end, in evaluating applications for certification, the Commission is tasked with considering potential environmental effects (Pub. Resources Code, § 25523; California Code of Regulation, tit. 20, § 1742) safety and reliability (Pub. Resources Code, California Code of Regulation, tit. 20, § 25511; California Code of Regulation, tit. 20, § 1743) and compliance with applicable law (California Code of Regulation, tit. 20, § 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. (California Code of Regulation, tit. 20, §1203.)

The written order claims, "We are convinced that that effect of the interconnection is negligible and find that the any potential impact the MEP may have on Line 002 is below the level of significance." (MEP Commission Decision, Hazardous Materials, p. 9.) In reaching this conclusion, the Comission has relied solely on witness testimony from applicant's "experts" who lacked personal knowledge of Line 002 and a five year old inspection.

How can such a sweeping conclusion be reached without any evidence from the pipeline owner and operator? The Commission impunes Mr. Bob Sarvey's testimony regarding Line 002, concluding that he is not an expert while the Commission made no effect to procure testimony from any expert that has actually analyzed Line 002. The written order impermissibly places the burden of presenting

evidence on an intervenor, when it sits squarely on the shoulders of the applicant. 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.

III. THE HEARING OFFICER AND COMMISSIONER DOUGLAS IMPROPERLY ENGAGED IN PROHIBITED EX PARTE COMMUNICATION DURING A HEARING AND SHOULD HAVE BEEN REMOVED FROM THESE PROCEEDINGS.

The Hearing Officer and Commissioner Karen Douglas engaged in prohibited ex parte communication in violation of Government Code section 11430.10 et seq. and California Code of Regulation, title 20, section 1216. Per Government Code section 11430.60, Commissioner Douglas should have been removed as the presiding officer in these proceedings: “Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the

presiding officer." (Govt. Code § 11430.60.) Commissioner Douglas was not disqualified but in fact wrote the order overruling the motion that was at issue and participated as the presiding member in the committee and commission vote to approve this project. All action taken in which Commissioner Douglas participated in after she engaged in prohibited ex parte communication is void and therefore, Mr. Simpson moves that the Commission's May 18th, 2011 written order approving MEP be reconsidered.

During the March 7, 2011 evidentiary hearing, Mr. Simpson moved that PG&E be subpoenaed to give testimony about its pipeline that would supply MEP. During a recess from the hearing, the Hearing Officer and Commissioner Douglas privately spoke with a PG&E attorney in the hall outside the hearing room. Then, when the hearing was reconvened, the Committee invited that attorney to offer testimony regarding Mr. Simpson's motion. The Committee allowed the witness to testify without being sworn. The Committee then denied the parties the opportunity to question the witness despite a specific request to do so. When the Committee was challenged on the ex parte communication, it violated Government Code section 11430.50 by refusing to make the communication part of the record. Finally, Commissioner Douglas wrongly relied on the contents of the ex parte communication and the unsworn testimony, not subject to cross examine, as justification in her written order for denying Mr. Simpson's motion.

California Code of Regulations, title 20, section 1216 endorses 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). The Hearing Officer and Commissioner Douglas engaged in this precise behavior and the Commission has further ratified this impermissible behavior by refusing to respond to Mr. Simpson's April 8th, 2011 motion addressing the ex parte communication, and allowing the continued participation of Commissioner Douglas as the presiding officer in these proceedings.

During the May 18th, 2011 Commission hearing, Commissioner Douglas and the Hearing Officer tried to argue that their actions were sanctioned as a communication addressing matters of procedure or practice. (5/18/11 RT 155:18-157:2.) Commissioner Douglas claims that the issue was "would we subpoena PG&E if they didn't come forward with their witnesses, ask the question how would you respond to a subpoena." (5/18/11 RT 155:9-12.) The Government Code sanctions a very limited scope of ex parte communications that does not include the communication in this case: "A communication otherwise prohibited by Section 11430.10 is permissible in any of the following circumstances: (a) The communication is required for disposition of an ex parte matter specifically authorized by statute. (b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy." (Gov. Code, § 11430.20.)

This exception does not apply in this case. The procedure at issue, would the commission issue a subpoena, was most certainly in controversy and the substance of the communication, how PG&E would react to such a subpoena, is certainly a substantive communication outside the bounds of a matter of procedure or practice.

IV. THE WRITTEN ORDER IS NOT IN COMPLIANCE WITH LORS

The written order does not comply with all "LORS" – all applicable laws, ordinances, regulations, and standards – as required by Public Resources Code sections 25525 and 25523, subd. (d)(1). This includes, among other, the Williamson Act and the California Environmental Quality Act.

Williamson act

If MEP is built as proposed, it will be in violation of a Williamson Act contract. The Commission therefore violated Public Resources Code sections 25525 and 25523, subd. (d)(1) by approving a written order that did not comply with this applicable law. The Williamson Act allows from Counties to contract with landowners to determine exactly what uses will be permitted. "Any city or county may by contract limit the use of agricultural land for the purpose of preserving such land pursuant and subject to the conditions set forth in the contract and in this chapter. A contract may provide for restrictions, terms, and conditions, including payments and fees, more restrictive than or in addition to those required by this chapter." (Govt. Code, § 51240.)

Williamson Law contracts must "Provide for the exclusion of uses other than agricultural, and other than those compatible with agricultural uses, for the duration of the contract" and are "binding upon, and inure to the benefit of, all successors in interest of the owner." (Govt. Code, § 51243.)

On December 12, 1989, the County Board of Supervisors adopted Resolution No. 89-947, which amended the February 4, 1971 Williamson Act contract, Land Conservation Agreement No. 5635. The amendment approved change of ownership and added the Byron power company wastewater facility as a compatible use. On that same day, the landowner and the County entered into the amended Williamson Act contract, Land Conservation Agreement No. C-89-1195 (the "Contract").

Exhibit Number 12, Appendix DR1-1, contains a copy of the Contract and the Alameda County Board of Supervisors Resolution R-89-947 approving the contract. Page 3 of the contract provides the restrictions on the use of the property, "During the term of this agreement, or any renewal thereof, the said property shall not be used for any purpose, other than agricultural uses for producing agricultural commodities for commercial purposes and compatible uses, which uses are set forth in Exhibit B attached hereto and incorporated by reference." Exhibit "B" provides for two uses, "1) Grazing, breeding or training of horses or cattle 2) Co-generation/waste water distillation facility as described by Conditional Use Permit C-5653."

In violation of Government Code sections 51240, 51243, and 51238.1, the County has based its analysis entirely on the general principles of compatibility instead of looking to the terms of the contracts. The terms of the contract govern what uses the land can be put to. In this case, the Contract enumerates the only permitted uses – "1) Grazing, breeding or training of horses or cattle 2) Co-generation/waste water distillation facility as described by Conditional Use Permit C-5653." MEP does not meet either of these uses and so, cannot be permitted on the land without violating the binding Contract.

The County and MEP's arguments that section 51238 allows that a power plant is a compatible use is of no moment because the land is covered by the Contract and section 51238 only applies to land that is not covered by a contract: "Sections 51230 and 51238 relate[s] to noncontracted lands within agricultural preserves." (Govt. Code, § 51238.1.)

CEQA

The proposed project has not complied with CEQA in countless aspects; the CEC has wrongly conclude that this project will not result in significant adverse land use impacts. MEP conflicts with a Williamson Act contract and so, by definition, will result in a significant adverse land use impact. (California Code of Regulation, tit. 14, § 15000 et seq.)

CONCLUSION

Neither the substance of the written order nor the procedure by which it was approved are in compliance with the law and so the Commission should reconsider and revoke the written order.

DATED: June 17, 2011.

By: 

April Rose Sommer

Attorney for Rob Simpson

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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:	)	Docket No. 09-AFC-3
	)	
	)	PROOF OF SERVICE
	)	
Mariposa Energy Project	)	

I, April Rose Sommer declare that on June 17, 2011, I transmitted copies of the attached Motion for Reconsideration by electronic mail to those identified on the Proof of Service list. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I also transmitted a copy of the attached Motion for Reconsideration to the chief counsel at Energy Resources Conservation and Development Commission, 1516 Ninth Street, Sacramento, CA 95814, Attn: Chief Counsel pursuant to California Code of Regulations, title 20, section 1002. I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 17, 2011.

By: April Rose Sommer
April Rose Sommer

Attorney for Rob Simpson