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TN #:	239489
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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application For Small Power Plant
Exemption for the **GREAT OAKS
SOUTH BACKUP GENERATING
FACILITY**

DOCKET NO: 20-SPPE-1

**SV1, LLC'S MOTION IN LIMINE TO
STRIKE INTERVENOR SARVEY'S
REPLY TESTIMONY**

INTRODUCTION

SV1, LLC (SV1) submits this Motion to in Limine pursuant to 20 California Code of Regulations (CCR) Sections 1211.5 and 1212 to strike Intervenor Sarvey's Reply Testimony (TN 239449), hereinafter "Sarvey's Purported Reply Testimony". Specifically SV1 respectfully requests the Committee exclude Sarvey's Purported Reply Testimony from the evidentiary record and instead treat it as public comment.

The basis and grounds for exclusion for this motion are:

- Intervenor Sarvey has violated the Commission Order¹ to file Opening Testimony on August 11, 2021 and instead has filed his Opening Testimony as Purported Reply Testimony with the intention of depriving Staff and Applicant from the ability to adequately respond to Intervenor Sarvey's contentions; and
- Intervenor Sarvey has engaged in gamesmanship to abuse the Commission process by withholding comments until the last possible moment.

SV1 requests the Committee hear oral arguments, if needed, on this motion at the previously scheduled Prehearing Conference on September 7, 2021 and that parties have until September 2, 2021 to file written responses to this Motion. SV1 also requests the Committee waive the time for response to this motion on the grounds that SV1 has good cause to request the motion be heard at the Prehearing Conference because Intervenor Sarvey filed his Purported Reply Testimony two days prior to this motion surprising the parties since he failed to file comments on the Draft Environmental Impact Report (DEIR); petitioned to intervene at the last possible moment; and most importantly failed to file Opening Testimony.

In addition, waiving the time for hearing this motion does not prejudice Intervenor Sarvey because

1. Mr. Sarvey already has actual notice of the Prehearing Conference date and time; he would have more time to respond in writing to this motion than he gave the parties to respond to his Purported Reply Testimony.
2. Pursuant to 20 CCR Section 1211.5 (c) a motion to exclude testimony can be made orally at the evidentiary hearing and decided at the hearing upon oral argument without the need for written motions.

Additionally, it would be fundamentally unfair for the Committee to arbitrarily allow additional time for Intervenor Sarvey to respond to this motion because the grounds are straight forward and the circumstances requiring hearing the motion are solely caused by his election to proceed in the manner described herein.

¹ NOTICE OF PREHEARING CONFERENCE, EVIDENTIARY HEARING, SCHEDULING ORDER, AND FURTHER ORDERS, dated June 19, 2021, TN 238471.

ARGUMENT

- I. **SV1 has a legal right to bring this motion and requests the Committee shorten the time for responses and hear the motion at the previously scheduled upcoming Prehearing Conference.**

Title 20, California Code of Regulations (CCR), Section 1212 (b) (2) provides:

Parties may move to exclude information from the hearing record on the ground that it is not relevant, is duplicative of information already in the record, or on another basis. If the presiding member grants such a motion, the information shall be excluded from the hearing record. While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency, and adequacy of the record.

SV1 is a party to the proceeding and therefore has the legal right to bring this motion. The Committee has the right to regulate the proceeding pursuant to 20 CCR, Section 1210.

SV1 could have moved to exclude Sarvey's Purported Reply Testimony at the evidentiary hearing pursuant to Section 1211.5 (c) by oral motion. However, in order to be fair and to allow the parties to prepare and argue it at the Prehearing Conference, SV1 provides this motion in writing as soon as practical prior to the Prehearing Conference, which has been previously noticed for September 7, 2021.

Therefore, SV1 is authorized to bring this motion and the Committee has the authority to waive time in order to hear and rule on it at the Prehearing Conference. The filing of this motion in writing affords the parties time to prepare and therefore, no party would be prejudiced if the Committee shortens the time for response and hear the motion at the September 7, 2021 Prehearing Conference.

II. **Intervenor Sarvey’s Purported Reply Testimony should be excluded from the evidentiary record because Intervenor Sarvey has violated the Commission Order. Allowing the evidence into the record would be unfair to the parties, would result in hearing inefficiency, and the evidence is not necessary to provide an adequate record.**

A. Standard of Review

20 CCR, Section 1212 (b) sets forth the standard of review for this motion to exclude evidence from the evidentiary record.

...questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency, and adequacy of the record.

For the reasons identified below, the Committee should exclude Sarvey’s Purported Reply Testimony on the basis that it is unfair to the parties and its exclusion is necessary to ensure the rules for hearing efficiency are preserved and followed. Additionally, the Purported Reply Testimony is not necessary to create an adequate record, because it can entered in the record as public comment.

B. Fairness To The Parties

The Commission Order reiterates that the participation of parties in the matter are subject to the presiding member’s authority to regulate the proceedings.

Parties have the right to call and examine witnesses, to offer oral and written testimony under oath, to introduce exhibits, to cross-examine opposing party witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence, subject to the presiding member’s authority to regulate this proceeding and other rights identified.²

Additionally the Order directed the parties as follows:

All parties intending to submit evidence for consideration at the Evidentiary Hearing are **ORDERED** to docket evidence and exhibit

² Ibid., page 4, citing to Cal. Code Regs., tit. 20, § 1212, subd. (a).

lists, **no later than 5:00 p.m.** on the dates specified in the attached Scheduling Order, unless otherwise directed by the Committee.

Because the Evidentiary Hearing will be held with remote access only (no physical location for participants to gather), failure by a party to comply with the filing requirements stated in this Order shall preclude that party from participating in the Evidentiary Hearing. Any party precluded may still offer public comment during the Evidentiary Hearing.³

The Committee Order provided that the date for filing Opening Testimony was August 11, 2021 and Reply Testimony on August 25, 2021.⁴

Intervenor Sarvey did not file Opening Testimony on April 11, 2021. Staff and SV1 timely filed Opening Testimony. The sole purpose of Opening Testimony is to provide evidence relevant to the proceeding. The only evidence relevant to a SPPE proceeding is evidence that addresses any of the Commission's three SPPE statutorily required findings.

The sole and only relevant purpose of Reply Testimony is for the parties to provide **evidence to rebut the evidence presented in Opening Testimony**. All of the parties know this including Intervenor Sarvey who has been participating in California Energy Commission proceedings as an Intervenor for over 13 years. It would be fundamentally unfair for the Committee to recognize Intervenor Sarvey as an expert in all technical subject matters and qualified to provide expert opinion testimony, but not treat him like an expert in Commission procedural requirements.

Intervenor Sarvey filed Purported Reply Testimony that does not specifically Reply to any of the Opening Testimony. It is in fact, his Opening Testimony that criticizes documents all of which were provided in the docket prior to date for filing Opening Testimony. Intervenor Sarvey failed to file comments on the DEIR which for any proceedings other than the Commission proceedings would have been the sole avenue for public comment.

Intervenor Sarvey's contentions in his Purported Reply Testimony are simply comments on the DEIR and rebuttal of the Staff's response to comments on the DEIR made by others. By failing to file the Purported Reply Testimony as Opening Testimony on August 11, 2021, Intervenor Sarvey is intentionally

³ NOTICE OF PREHEARING CONFERENCE, EVIDENTIARY HEARING, SCHEDULING ORDER, AND FURTHER ORDERS, dated June 19, 2021, TN 238471 pages 6-7.

⁴ Ibid., page 15.

attempting to avoid the procedural exchange of information necessary to allow all parties the opportunity to respond in a timely and efficient manner. This technique of “surprise” has been used by Intervenor Sarvey in prior proceedings and because the Committees fail to enforce the rules on him, he and other Intervenors are encouraged to further employ maneuvering tactics such as this one in order to gain an unfair advantage over other parties.

C. Hearing Efficiency

The Committee has an opportunity and a duty to ensure that hearings are conducted pursuant to fair and understandable rules. Failure to enforce rules renders the hearings inefficient and unfair. If the Committee allows one Intervenor to routinely exploit the opportunity to participate through more than public comment, it encourages other parties to do so as well. In the specific case, Intervenor Sarvey’s failure to file his Purported Reply Testimony as Opening Testimony, in addition to his failure to file comments on the DEIR, require the evidentiary hearing to be more complex as neither Staff nor SV1 has had the opportunity to respond in writing to Mr. Sarvey’s new and untimely assertions. By having to respond to Mr. Sarvey’s Purported Reply Testimony at the evidentiary hearing, it requires the hearing to be longer, more complex, and creates additional opportunities to bring up new issues in rebuttal at the hearing. This in turn makes the evidentiary record more complex increasing the effort and timing for preparation of a Proposed Decision. This has been caused solely because Intervenor Sarvey knowingly and intentionally failed to participate in this proceeding in an open and fair manner.

The Committee should finally say enough is enough.

D. Adequacy of the Record

Intervenor Sarvey’s Purported Reply Testimony is not necessary to create an adequate record, simply because they can be entered into the record as public comment. A ruling otherwise would require all testimony of all parties to be required for an adequate record regardless of whether any of it is relevant, proper expert testimony, untimely filed, or excluded for any other reason.

CONCLUSION

Intervenor Sarvey intervened in these proceedings at the latest possible time for intervention. Intervenor did not file any comments on the DEIR in order to ensure that Staff could not respond to such comments in the FEIR. Intervenor Sarvey failed to file Opening Testimony in order to prevent the parties from being able to provide written Reply Testimony to refute his contentions. Intervenor Sarvey filed his Purported Reply Testimony one day before the deadline to file Reply Testimony to ensure that the parties would not have an opportunity to provide written expert testimony to refute his contentions. Intervenor Sarvey's actions should be discouraged by the Committee with a swift ruling that his Purported Reply Testimony be excluded from the evidentiary record and at most be considered as public comment. The Committee should enforce its orders and should ensure integrity of its hearing process and that all parties, not just intervenors, be treated uniformly and fairly.

Dated: August 27, 2021

Respectfully Submitted,



Scott A. Galati
Counsel to SV1, LLC