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CALIFORNIA ENERGY COMMISSION

CALIFORNIA NATURAL RESOURCES AGENCY

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

APPLICATION FOR SMALL POWER PLANT EXEMPTION FOR THE: **GREAT OAKS SOUTH BACKUP GENERATING FACILITY**	**Docket No. 20-SPPE-01**

CEC STAFF'S RESPONSE TO SV1, LLC'S MOTION IN LIMINE TO STRIKE INTERVENOR SARVEY'S REPLY TESTIMONY

On June 24, 2021, the Committee overseeing this proceeding issued a Notice of Prehearing Conference, Evidentiary Hearing, Scheduling Order, and Further Orders (Order) (TN 238471) establishing, among other things, the schedule for submittal of testimony in this proceeding. The order confirmed that the close of public comment period on staff's draft EIR (DEIR) was July 6, 2021 and specified that "all parties file opening testimony" on August 11, 2021, and "all parties file reply testimony" on August 25, 2021. (Order, p. 15 [capitalization omitted].)

As noted in SV1 LLC's Motion in Limine to Strike Intervenor Sarvey's Reply Testimony (Motion) (TN 239489), the order states that "[a]ll parties intending to submit evidence for consideration at the Evidentiary Hearing are ORDERED to docket evidence and exhibit lists, no later than 5:00 p.m. on the dates specified in the attached Scheduling Order, unless otherwise directed by the Committee" and "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." (Order, p. 6 [emphasis omitted].)

Intervenor Sarvey filed for Intervenor status on July 6, 2021, which was granted by the Committee on August 2, 2021, with the proviso that "[p]etitioner may exercise the rights and shall fulfill the obligations of a party as set forth in all orders issued in this matter and California Code of Regulations, title 20, section 1212. Deadlines and other matters shall not be extended or changed by the granting of this Petition." (Committee Order on Petition to Intervene Filed By Robert Sarvey, p. 2.)

The Committee did not issue any other orders alleviating Intervenor Sarvey from the filing requirements specified in the Order, nor has Intervenor Sarvey requested relief from any requirements. Staff and the applicant filed opening testimony as directed on August 11, 2021. Intervenor Sarvey did not file any comments on the Draft EIR nor did he file opening testimony by the August 11, 2021 deadline. He did, however, submit

what he titled reply testimony on August 10, 2021, one day before the deadline for such testimony.

Applicant filed its Motion to strike this testimony on August 27, 2021 and, in accordance with the Committee's Order Shortening Time on Applicant's Motion In Limine establishing a deadline for responses of September 8, 2021, staff files our response to this motion here.

In order to address this issue, the Committee must answer several questions including what, if anything, differentiates reply testimony from opening testimony; and may a party submit reply testimony if they have not submitted opening testimony, if it is indeed truly reply testimony (i.e. is there any legitimate reason a party would not submit opening testimony but would have cause to submit reply testimony?).

In considering these questions, it seems reasonable to conclude that if Intervenor Sarvey's reply testimony is really just opening testimony with a different label, then he should not be allowed to submit it late by simply attaching a different name to it. Ruling otherwise would simply encourage the gaming of the scheduling order, as SV1, LLC argues, allowing a party to not only gain more time to submit a filing (in contravention of the Order itself and without requesting leave to do so by the Committee) but also deprive the other parties of the opportunity to respond to the proffered testimony. As directed by California Code of Regulations, title 20, section 1212, "questions of relevance and of 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." Not only would allowing a late filing under the guise of reply testimony be unfair to the other parties, it is detrimental to the evidentiary record as it deprives the parties of the opportunity to present well-articulated written responses to a party's testimony and give the decisionmakers a more complete picture of the areas of disagreement in advance of the evidentiary hearing.

1. Opening and Reply Testimony Are Not Intrinsically Different and Intervenors Who Wish to Litigate Matters at the Evidentiary Hearing Should be Required to File Opening Testimony

Neither the Order nor any other Committee orders or CEC regulations define or explain the difference between opening testimony and reply testimony. From a plain reading of the Order, consistent with how parties have previously interpreted similar orders, opening testimony is the testimony *all* parties propose to place into the record and reply testimony affords *all* parties the opportunity to respond to any opening testimony the parties feel it necessary to respond to. This interpretation makes sense in the context of California Energy Commission (CEC) proceedings; CEC staff publish an environmental document, subject to a public comment period and based on the application and other documents submitted by the applicant, well before opening testimony is due. For opening testimony, staff and the applicant usually just point to these previously filed documents. Thus, intervenors already have advance knowledge of what the other parties' testimony will be and can formulate their own opening testimony accordingly. In

this scenario, there is no justification for an intervenor to not file opening testimony if they subsequently file reply testimony unless that reply testimony is limited to addressing new information presented for the first time in the other parties' opening testimony. In other words, because staff's and the applicant's positions are in almost all instances well-known prior to the deadline for opening testimony, if an intervenor has a disagreement with such positions, there is no reason such disagreement should not be considered in the intervenor's opening testimony and subject to the deadline for such. To conclude otherwise would be to hold that intervenors are subject to different rules than staff and applicant, a position not reflected in the Order. Scheduling orders issued by the CEC have consistently required intervenors to file opening testimony at the same time as the other parties (*see* Order, p. 15 ["all parties file opening testimony"].)

Thus, to address SV1, LLC's motion, the Committee should evaluate whether Intervenor Sarvey's reply testimony addresses new information presented for the first time in staff's or applicant's opening testimony (thus justifying its filing as reply testimony), or whether it addresses information that was presented earlier in time and could have thus been addressed in opening testimony.

2. Intervenor Sarvey's Reply Testimony is Opening Testimony Under a Different Name

Staff's August 11, 2021, opening testimony references the Final Environmental Impact Report (FEIR) filed previously on July 28, 2021, (which itself is not significantly different from the DEIR published on May 21, 2021) and includes various resumes and declarations to facilitate entering the FEIR into the record at the evidentiary hearing. The applicant's opening testimony similarly referred to previously filed documents as its testimony and included resumes and declarations to facilitate entering these documents into the record at the evidentiary hearing. The only additional testimony contained in the applicant's opening testimony was a reiteration of their disagreement with MM GHG-1 that they had previously made on August 6, 2021. On August 18, 2021, staff filed an addendum to the FEIR proposing a modification to MM GHG-1.

Intervenor Sarvey's reply testimony addresses four main topic areas, all of which respond to analyses staff and applicant publicly presented well before opening testimony: Air Quality, Emergency Operations, Greenhouse Gas Emissions, and Alternatives. And Intervenor Sarvey's position on several of these issues (namely Emergency Operations and Alternatives) reflect positions he's held in proceedings that predate this one. Intervenor Sarvey cannot argue that there was insufficient information available about the project or staff's analysis such that he was unable to formulate his testimony until staff or the applicant identified theirs.

Staff does acknowledge that subsequent to filing its opening testimony staff proposed a modification to MM GHG-1. Even though Intervenor Sarvey's reply testimony on GHG does not address the change to MM GHG-1 proposed by staff -- and therefore could have, and perhaps should have been, provided as opening testimony -- because of the issue's late evolving status, staff believes it is reasonable to allow that portion of

Intervenor Sarvey's testimony to remain. But there were no changes to any of the other topics that Intervenor Sarvey addresses in his testimony and, thus, no justification for their late filing.

3. Conclusion

Intervenor Sarvey did not request leave from the Committee to file this (Air Quality, Emergency Operations, and Alternatives) testimony late, nor does he explain why this testimony could not have been provided in accordance with the Order; therefore, staff respectfully recommends that the Committee grant SV1, LLC's motion as to these topics and receive Intervenor Sarvey's testimony as public comment. As noted by SV1, LLC, this would ensure fairness to the parties, hearing efficiency, and adequacy of the record and would not prejudice Intervenor Sarvey as his statements would still come into the record as public comment.

DATED: September 8, 2021

Respectfully submitted,

/s/

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