

## DOCKETED

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**STATE OF CALIFORNIA**  
**ENERGY RESOURCES**  
**CONSERVATION AND DEVELOPMENT COMMISSION**

In the matter of:

Application for Certification of the  
**PUENTE POWER PROJECT**

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DOCKET NO. 15-AFC-01

**MOTION TO STRIKE APPLICANT'S  
REBUTTAL TESTIMONY**

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MOTION TO STRIKE APPLICANT'S REBUTTAL TESTIMONY  
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## **I. Introduction**

On January 24, 2017, Applicant NRG Oxnard Energy Center, LLC submitted a document containing nearly 800 pages of purported rebuttal testimony. Not only did NRG's document dwarf the rebuttal testimony offered by intervenors and staff, but it was over three times larger than the opening testimony NRG docketed less than a week earlier.

The size of NRG's submission is partially explained by the fact that 10 of NRG's 17 rebuttal expert declarations do not actually rebut the opening testimony of intervening parties. Instead, these declarations are new, and untimely, opening testimony. By submitting this testimony nearly a week after the January 18, 2017 opening testimony deadline, NRG took additional time to prepare its testimony that the intervening parties did not receive. NRG's late filing has also denies the other parties and staff the opportunity to rebut the new information NRG submitted. For these reasons, the Committee should strike NRG "rebuttal" declarations 2-6, 9, 10, 12, 13, 15, and 17, and all corresponding attachments from the record in this proceeding.

## **II. NRG's Testimony Addressing FSA Analysis and Related Documents Should Have Been Submitted by the Opening Testimony Deadline.**

Throughout this proceeding, the Committee's scheduling orders have consistently sequenced opening testimony to follow release of the FSA, with rebuttal testimony following opening testimony.<sup>1</sup> This sequence allowed parties to use their opening testimony to introduce new evidence and respond to issues already identified during the proceeding, including those evaluated in the FSA. As in most adjudicative proceedings, rebuttal testimony was reserved for responding to issues raised in opening testimony. The Committee affirmed the purpose of this schedule sequence in its January 20, 2017 Notice of Prehearing Conference, Scheduling Order, and Further Orders ("Scheduling Order"), reminding the parties that rebuttal testimony should be limited to addressing issues raised in opening testimony.<sup>2</sup>

NRG was apparently aware of the purpose of opening and rebuttal testimony months earlier. In its objections to staff's proposal to extend the FSA publication deadline past November 18, 2016, NRG proposed an alternative schedule:

[I]f staff finds that it is impossible to complete the additional analysis [for the FSA], the Committee should direct staff to publish the FSA as scheduled [on November 18], and to

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<sup>1</sup> See, e.g., TN# 215465, Attachment A; TN# 214530 at 4; 214018 at 4.

<sup>2</sup> TN# 215476 at 2.

issue an FSA supplement with any additional analysis on or before December 21, 2016, which is the current deadline for all other parties to file opening testimony. The parties would have ample opportunity to review, and, if necessary, respond to the new analysis in their rebuttal testimony.<sup>3</sup>

This request demonstrates NRG's understanding that, absent an order stating otherwise, opening testimony should respond to issues in the FSA and rebuttal testimony would be submitted in response to issues raised in the opening testimony.

Additionally, NRG could have sought clarification from the Commission if NRG had any lingering doubts regarding the scope of opening and rebuttal testimony. The City did just that prior filing its opening testimony. In response to an inquiry from the City, the public advisor's office confirmed that rebuttal testimony should be used to respond to opening testimony, and that responses to the FSA's analysis should be included within the opening testimony.<sup>4</sup>

### **III. The Committee Should Strike NRG's Untimely Testimony.**

The following declarations contained in NRG's January 24 "rebuttal" submission do not rebut information contained in the parties' opening testimony; instead, they offer new information regarding the alternative sites considered in the FSA and PSA:

*Declaration of Mark Hale Regarding Alternative Sites – Archaeological Resources*

*Declaration of Jeremy Hollins Regarding Alternative Sites – Historic Architectural Resources*

*Declaration of Julie Love Regarding Alternative Sites – Biological Resources*

*Declaration of Tim Murphy Regarding Alternative Sites – Land Use<sup>5</sup>*

*Declaration of George Piantka Regarding Project Alternatives*

*Declaration of Gary Rubenstein Regarding Alternative Sites – Aviation Hazards,*

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<sup>3</sup> TN3 214369, Supplement to Applicant's Status Report No. 9 – Objection to Proposed Schedule Delay at 3.

<sup>4</sup> See Declaration of Edward Schexnayder in Support of Motion to Strike.

<sup>5</sup> This testimony also suggests that it responds to the Opening Testimony of Ashley Golden introduced by the City. But Mr. Murphy's testimony focuses solely on land use designations for the Ormond Beach alternative site, an issue not discussed in Ms. Golden's testimony.

*Declaration of Gary Rubenstein Regarding Alternative Sites – Environmental Justice*

*Declaration of Brian Theaker Regarding Transmission Interconnection for Alternative Sites*

*Declaration of Tricia Winterbauer Regarding Alternative Sites – Site Contamination Issues*

Additionally, the *Declaration of Julie Love Regarding the Presence of Wetlands on the Puente Project Site* addresses wetlands designation contained in the Coastal Commission's 30413(d) Report, which was docketed nearly three months before the FSA and incorporated into the FSA's analysis. Like the other declarations cited above, this testimony both could have and should have been submitted with NRG's opening testimony.

#### **IV. NRG's Untimely Filing Has Prejudiced the Other Parties and Should be Stricken.**

As many intervenors have commented, the time period between the FSA's publication and the opening testimony deadline was quite short, especially given limited witness availability during the winter holidays. By failing to submit its responses to the FSA until the rebuttal testimony deadline,<sup>6</sup> NRG improperly took an additional week to prepare its opening testimony that the intervening parties did not receive.

Additionally, by submitting late opening testimony at the same time as its rebuttal testimony, NRG has denied the other parties the opportunity to offer testimony rebutting the new issues raised by NRG. For instance, NRG witness Mark Hale testified for the first time about specific archeological resources that may exist near the Fifth Street/Del Norte alternative site, which had been evaluated in both the PSA and FSA.<sup>7</sup> NRG never raised this issue in its opening testimony or comments on the PSA. The parties now lack the opportunity to develop and offer contrary testimony to this and other new information contained in NRG's rebuttal testimony. Basic fairness requires exclusion of NRG's untimely filing.

#### **V. Conclusion**

For these reasons, the City respectfully requests that the Committee strike NRG rebuttal declarations 2-6, 9, 10, 12, 13, 15, and 17, and all corresponding attachments.

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<sup>6</sup> Notably, *all* of NRG's January 25, 2017, including testimony properly responding to intervenors' opening testimony, was submitted well after 3 p.m. filing deadline reaffirmed in the Committee's Scheduling Order. *See* TN# 215553.

<sup>7</sup> TN# 215553, Declaration 3 at 2-3.

DATED: January 27, 2017

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