

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

DOCKET

07-AFC-4

DATE _____

RECD. SEP 30 2008

In the Matter of:
The Application for Certification
for the CHULA VISTA ENERGY
UPGRADE PROJECT

Docket No. 07-AFC-4

**RESPONSE TO EVIDENTIARY HEARING ORDER
OF INTERVENOR ENVIRONMENTAL HEALTH COALITION**

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STATE OF CALIFORNIA

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The September 24, 2008 Evidentiary Hearing Order issued in this proceeding directed the parties to file and serve supplemental written testimony, additional exhibits, and revised exhibit lists by Tuesday, September 30, 2008. Additional exhibits, revised exhibit lists, and supplemental testimony sponsored by Intervenor Environmental Health Coalition ("EHC") accompany this Response to the Evidentiary Hearing Order, as set forth herein. This Response also addresses EHC's concerns with: (1) the Evidentiary Hearing Order's restrictions on public participation and (2) the order in which witnesses will appear. Finally, this Response supplements EHC's Prehearing Conference Statement regarding the scope of, and time requested for, cross-examination of other parties' witnesses.

I. The Evidentiary Hearing Order's Restrictions on Public Participation Are Unreasonable.

The Evidentiary Hearing Order requires "any person wishing to provide public comment in written or electronically recorded form [to] submit

such materials to the Public Adviser no later than September 25, 2008.” (Evid. Hearing Order at 3.) The Evidentiary Hearing Order was issued on September 24, 2008. The first e-mail notice to persons on the mailing list for this proceeding, sent just after noon on September 24, provided an incorrect link to the Evidentiary Hearing Order. The second e-mail notice, providing the correct link, was sent after 2:00 p.m. on September 24. Neither notice alerted members of the public to the fact that the Evidentiary Hearing Order contained any restrictions on public participation. As a result, members of the public had *at most* just over 24 hours to find the Evidentiary Hearing Order on the Commission’s website, read the public participation section (or find an translator who could), prepare written or recorded comments, and submit those comments to the Public Adviser.

This restriction is unreasonable and contrary to both the letter and the spirit of applicable regulations. The rule cited in the Evidentiary Hearing Order authorizes the presiding member to “specify such conditions on the right to comment as are reasonably necessary for the orderly conduct of the proceeding.” (20 C.C.R. § 1711.) The presiding member also “may request that written comments be submitted in advance of any hearing.” (*Id.*) Giving the public just one day to prepare written comments—to meet a deadline one full week before the hearing—is not “reasonably necessary” to the orderly conduct of the hearing. If this deadline is strictly enforced, members of the public who were unable to discover the restriction and/or prepare written comments in a timely fashion will be deprived of an opportunity to comment on this project. This would violate

other key requirements of section 1711, namely that “[a]ny person interested in a notice or application proceeding *shall* be given an opportunity to make oral *or written* comments on any relevant matter *at any hearing* or information meeting held on a notice or an application.” (*Id.* [emphasis added].)

Accordingly, EHC requests that the Committee accept written public comments, and electronically recorded comments submitted in a readily portable and readable electronic form (for example, on CD-ROM), at the evidentiary hearing. EHC’s request is consistent not only with section 1711, but also with other governing regulations. Specifically, “[a]ny exhibits, including charts, graphs, maps, and other documents relevant to testimony *or comments* may be submitted to the presiding member *at any hearing*.” (20 C.C.R. § 1211 [emphasis added].) Moreover, the “hearing record” as defined in the regulations expressly includes “public comment offered at a hearing or entered into the record at a hearing,” without placing any restrictions on the form (spoken, written, or recorded) that comment takes. (20 C.C.R. § 1702(h)(3).)

EHC recognizes that the evidentiary hearing must proceed in an orderly fashion, especially given the large number of witnesses and disputed issues in this proceeding. EHC also recognizes, however, that public comment—especially regarding a project, like this one, that has generated a high level of community interest—plays an important role in the hearing. We trust that the Public Adviser can develop some means of collecting written and recorded comments at the hearing in a manner that will not disrupt the taking of evidence.

Indeed, collecting written comments at the hearing may actually facilitate an orderly and efficient process by giving members of the public an alternative to delivering their comments orally.

II. Witnesses

A. Order of Witnesses

The list of topics and witnesses contained in Attachment A to the Evidentiary Hearing Order differs from the information provided in EHC's prehearing conference statement. Specifically, witnesses sponsored by EHC do not intend to offer testimony on all topic areas identified in the witness list. EHC therefore provides the following information in an effort to clarify the order of presentation of witnesses and simplify the taking of testimony.

Diane Takvorian: The Evidentiary Hearing Order states that Ms. Takvorian will testify on Air Quality, Public Health, Socioeconomic Resources (including Environmental Justice), Land Use, and Alternatives. EHC's Prehearing Conference Statement noted that Ms. Takvorian's testimony will address the Project's general noncompliance with environmental justice principles. Indeed, the bulk of Ms. Takvorian's testimony addresses Socioeconomics, and it may make sense to elicit her testimony as part of that topic area discussion. EHC is willing to introduce Ms. Takvorian's testimony at the earliest time that the Committee deems convenient. However, EHC does not expect Ms. Takvorian to address topic areas other than Public Health or Socioeconomics in detail.

Joy Williams, MPH: The Evidentiary Hearing Order states that Ms. Williams will testify on Air Quality, Public Health, Socioeconomic Resources, and Land Use. EHC's Prehearing Conference Statement noted that Ms. Williams' testimony will address the environmental justice implications of the relationship between air pollution and public health impacts, as well as the relative concentration of hydrocarbon-fueled electrical generation facilities in metropolitan statistical areas within San Diego County. This testimony could be elicited in the Air Quality, Public Health, or Socioeconomics topic areas. EHC does not expect Ms. Williams to address other topic areas in detail. In the interest of efficiency, therefore, EHC would prefer to present all of Ms. Williams' testimony at the earliest time the Committee deems appropriate.

Diana Vera: The Evidentiary Hearing Order states that Ms. Vera will address Socioeconomic Resources, Land Use, and Alternatives. EHC's Prehearing Conference Statement noted that Ms. Vera's testimony would address the increasing concentration of industrial facilities in her neighborhood, as well as the community's reaction to the City's offer to purchase home improvements and new appliances for affected residents using funding provided by the Applicant. EHC would propose that Ms. Vera's testimony be elicited as part of the Land Use topic area. EHC does not expect Ms. Vera to address Alternatives.

Bill Powers, P.E.: The Evidentiary Hearing Order states that Mr. Powers will address Facility Design, Transmission System Engineering, and Alternatives. EHC's Prehearing Conference Statement specified that Mr. Powers'

testimony will address the availability of demand reduction and renewable generation alternatives to the Project, including more prudent and feasible means of achieving public convenience and necessity. EHC did not identify either Facility Design or Transmission System Engineering as disputed issues in this proceeding, and does not expect Mr. Powers to offer testimony on any topic area other than Alternatives.

B. Additional Witness

EHC intends to offer the testimony of one witness, Sharon Ward, who was not identified in the Prehearing Conference Statement. A copy of this witness's written testimony (designated as Exhibit 628) was provided to all parties at the prehearing conference on September 18, 2008. A copy of a declaration in support of this testimony is provided with this Response (see Part III, below).

Ms. Ward is a resident of the Chula Vista neighborhood closest to the Project site. Her expertise is based on her having lived in the area near the Project for nearly 40 years. She will testify as to her personal knowledge of the neighborhood, her use of the Otay Regional Park, and her reaction to the City's and the Applicant's offer to pay for improvements to houses in her neighborhood. EHC anticipates that no more than 30 minutes will be required to present Ms. Ward's testimony, depending on the amount of cross-examination by other parties.

C. Cross-Examination

In its Prehearing Conference Statement, EHC reserved the right to supplement its cross-examination requests pending review of other parties'

prehearing conference statements, witness lists, and exhibit lists. Upon further review of these documents, EHC intends to cross-examine the following witnesses:

William Walters (Staff, Air Quality) regarding Project emissions and mitigation measures (30 minutes);

Gregory Darvin (Applicant, Air Quality) regarding Project emissions (15 minutes);

Obed Odoemelam (Staff, Public Health) regarding Project public health impacts (15 minutes);

Jacob Hawkins (Staff, Socioeconomics) regarding Environmental Justice issues (15 minutes);

Erin Bright (Staff, Power Plant Reliability) regarding project reliability (15 minutes);

Negar Vahidi (Staff, Land Use) regarding LORS consistency (30 minutes);

Matthew Franck (Applicant, Land Use) regarding zoning consistency (30 minutes);

Christopher Meyer (Staff, Alternatives) regarding analysis of project alternatives (30 minutes);

Sarah Madams (Applicant, Alternatives) regarding analysis of project alternatives (30 minutes).

EHC also requests the opportunity to question any witness who might appear on behalf of the California Independent System Operator (as discussed at the Prehearing Conference) regarding project reliability and alternatives. EHC would expect that such questioning would take no longer than 15 minutes.

III. Exhibits

A. Omitted Exhibits

Copies of four exhibits were omitted from the set of documents distributed at the prehearing conference. These exhibits are filed and served concurrently with this response, as follows:

Exhibits 610 and 627: These exhibits are declarations authenticating and laying the foundation for testimony of Diana Vera and Sharon Ward.

Exhibits 613 and 614: These exhibits relate to a petition circulated by EHC regarding the Project. Exhibit 613 is a declaration from Laura Hunter, the director of EHC's Clean Bay Campaign, regarding circulation of the petitions. Exhibit 614 contains copies of signature blocks from the petitions.

B. Additional Exhibits

EHC is filing and serving additional exhibits concurrently with this Response as follows:

Exhibit 617 (tabs D through L): This supplement to Exhibit 617, as distributed at the Prehearing Conference, provides additional documents in support of the testimony of Bill Powers, P.E.

Exhibit 618: This exhibit is being expanded to include Parts 1, 2, and 4 of the 2008 Carl Moyer Program Guidelines in their entirety.

Exhibit 629: This exhibit contains copies of zoning ordinance provisions and Commission staff reports for projects referenced in the Applicant's Exhibit 24.

Exhibit 630: This exhibit contains excerpts from the Final Environmental Impact Report for the Chula Vista Vision 2020 General Plan Update regarding the threshold of significance for noise impacts.

Exhibits 631 and 632: These exhibits contain a declaration and a map prepared by Theresa Acerro showing the location of schools, recreational centers, and other facilities within one mile of the project.

C. Official Notice

There have been some changes in the designation of documents for which EHC will be seeking official notice. Accordingly, EHC wishes to supplement the discussion in its Prehearing Conference Statement as follows:

Exhibit 626: This exhibit contains copies of documents generated and received by the City of Chula Vista during the 2005 General Plan update process. In essence, these documents comprise the "legislative history" of General Plan Policy E 6.4. The attached declaration of Stephen Padilla is offered for the

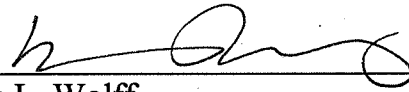
purpose of authenticating the documents. The declaration and attachments were provided to all parties at the prehearing conference.

EHC intends to ask the Committee to take official notice of the documents in Exhibit 626, as well as the documents contained in Exhibits 618 through 625 and Exhibit 630, pursuant to 20 C.C.R. § 1213.

Dated: September 30, 2008

Respectfully Submitted,

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Docket No. 07-AFC-4

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I, Kevin P. Bundy, declare that on September 30, 2008, I deposited copies of the attached RESPONSE TO EVIDENTIARY HEARING ORDER OF INTERVENOR ENVIRONMENTAL HEALTH COALITION in the United States mail at San Francisco, California, with first class postage thereon fully prepaid and addressed to those on the Proof of Service list above.

--OR--

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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

Kevin P. Bundy