

**DOCKET**

**09-AFC-3**

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STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

Application for Certification for the )  
Mariposa Energy Project )  
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\_\_\_\_\_ )

Docket No. 09-AFC-03

**OPPOSITION TO  
THE PETITION FOR RECONSIDERATION  
By  
INTERVENOR ROB SIMPSON**

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## **INTRODUCTION**

Pursuant to Section 1716.5 of the Commission’s Rules of Practice and Procedure, Mariposa Energy Project, LLC (“Applicant”), the owner of the Mariposa Energy Project (“MEP”), hereby files this *Applicant’s Opposition to the Petition for Reconsideration by Intervenor Rob Simpson* (this “Opposition”).<sup>1</sup>

In his Petition for Reconsideration (“Simpson’s Petition”), Mr. Simpson alleges that PG&E “must be subpoenaed” in order to “conduct a full analysis of Line 002 and its relationship with MEP”, and accuses the Committee of improperly relying on an ex parte communication as a basis for denying Mr. Simpson’s motion.<sup>2</sup> However, as will be explained below, Mr. Simpson’s arguments are without merit. The Committee properly denied Mr. Simpson’s Motion to Subpoena PG&E for failure to show good cause as there is substantial evidence in the record regarding the interconnection of MEP with Line 002.<sup>3</sup>

## **PROCEDURAL HISTORY**

The Application for Certification (“AFC”) for MEP was filed on June 15, 2009, and accepted as data adequate on August 26, 2009. On January 7, 2011, Mr. Simpson filed a petition to intervene in the MEP proceedings, which was granted on January 19, 2011. Mr. Simpson was notified in the *Committee Order Granting Petition to Intervene and Further Order* that he “may exercise the rights and shall fulfill the obligations of a party as set forth in section 1712 of the Commission’s regulations.”<sup>4</sup> On January 21, 2011, Mr. Simpson submitted a single page of rebuttal testimony regarding land use, and his opinions regarding the possible effects of MEP on property values.<sup>5</sup> On January 25, 2011, Mr. Simpson submitted his Prehearing Conference Statement, in which he identified no other topic areas in dispute beyond those

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<sup>1</sup> As the pages in the petition are unnumbered, all citations to Simpson’s Petition refer to the pdf page number.

<sup>2</sup> *Petition for Reconsideration of Energy Commission’s Committee Order of Intervenor Rob Simpson*, 09-AFC-03 (filed April 8, 2011) (“Simpson’s Petition”).

<sup>3</sup> *Ruling on Motion to Subpoena PG&E*, 09-AFC-03, p. 6 (March 28, 2011).

<sup>4</sup> *Committee Order Granting Petition to Intervene and Further Order*, 09-AFC-03 p. 2 (Jan. 19, 2011); also see 20 C.C.R. § 1207.

<sup>5</sup> Ex. 1000.

identified by “other intervenors.”<sup>6</sup> Mr. Simpson sponsored no witnesses, besides himself on the topic of land use.<sup>7</sup> Mr. Simpson identified no other witnesses that he wished to cross-examine beyond those identified by “other intervenors.”<sup>8</sup> Notably, neither Mr. Simpson nor any of the “other intervenors” identified PG&E as a witness that they wanted to examine.<sup>9</sup>

## DISCUSSION

### **I. The subpoena of Pacific Gas & Electric (“PG&E”) is not necessary or relevant to any decision that the Commission must make in the certification of MEP.**

In his petition, Mr. Simpson criticizes the Committee for “confus[ing] the concept of regulatory jurisdiction with a limit on its powers and duty to investigate”<sup>10</sup> and for being “remiss in its duties in refusing to conduct a full analysis of Line 002 and its relationship with MEP.”<sup>11</sup> These rhetorical volleys are both groundless and unsupported by the evidentiary record.

#### **A. The Warren-Alquist Act Makes Clear that the CEC Has No Jurisdiction Over Natural Gas Pipelines Beyond The First Point Of Interconnection.**

As described in *Applicant’s Brief on Natural Gas Pipeline Jurisdiction*,<sup>12</sup> the California Energy Commission’s (“Commission’s”) jurisdiction over gas pipelines does not extend beyond a project’s first point of interconnection on the system.<sup>13</sup> Thus, when making its decision on MEP, the question before the Commission is whether the 580-foot service interconnection from MEP to the PG&E natural gas system can be built in a safe and reliable manner. This “relationship” between MEP and the PG&E natural gas system emphasized by Mr. Simpson has been fully analyzed by Applicant and CEC Staff.<sup>14</sup> Both Applicant and CEC Staff have determined that MEP can be safely and reliably interconnected to the PG&E system. Simpson’s Petition invites the CEC to investigate the integrity of the entire 180-mile

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<sup>6</sup> Prehearing Conference Statement of Rob Simpson, 09-AFC-3 (Jan. 25, 2011).

<sup>7</sup> Prehearing Conference Statement of Rob Simpson, 09-AFC-3 (Jan. 25, 2011).

<sup>8</sup> Prehearing Conference Statement of Rob Simpson, 09-AFC-3 (Jan. 25, 2011).

<sup>9</sup> Prehearing Conference Statement of Rob Simpson, 09-AFC-3 (Jan. 25, 2011).

<sup>10</sup> Simpson Petition, p. 6.

<sup>11</sup> Simpson Petition, p. 5.

<sup>12</sup> *Applicant’s Brief on Natural Gas Pipeline Jurisdiction*, 09-AFC-03, pp. 1-2 (Feb. 18, 2011).

<sup>13</sup> California Public Resources Code § 25110; 20 C.C.R. § 1702(n).

<sup>14</sup> For example, *see* Ex. 301, pp. 4.4-1, 6-7, 14-15.

Line 002, notwithstanding the CPUC’s clear and plenary jurisdiction over the PG&E gas transmission system. Mr. Simpson’s invitation should be rejected.

**B. There are no direct or indirect environmental impacts of the Mariposa Energy Project on the natural gas pipeline system beyond the first point of interconnection.**

In the context of the California Environmental Quality Act (“CEQA”), the record demonstrates that there are no direct or indirect environmental impacts of the Mariposa Energy Project on the natural gas pipeline system beyond the first point of interconnection. Under CEQA, the environmental review of a proposed project must describe any *environmental* consequences imposed by the project, including significant direct effects and significant indirect effects that are reasonably foreseeable.<sup>15</sup> In examining the question of what effects are “reasonably foreseeable” for the purposes of analyzing environmental impacts, courts have held that an impact is reasonably foreseeable if it is “sufficiently likely to occur” such that “a person of ordinary prudence would take [it] into account in reaching a decision.”<sup>16</sup> For the purposes of CEQA analysis, an “indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.”<sup>17</sup> Impacts which are too broad, vague, or attenuated are properly excluded from consideration under CEQA.

Mr. Simpson has not offered any testimony in this proceeding on the subject of hazardous materials, let alone identified any direct impacts or indirect effects that are reasonably foreseeable from MEP’s interconnection with Line 002. As explained in *Applicant’s Brief on Natural Gas Pipeline Jurisdiction*, there must be evidence of “a reasonably close causal relationship between a change in the physical environment and the effect at issue.”<sup>18</sup> There is no evidence in the record that the interconnection of MEP will have any adverse effect on PG&E’s natural gas pipeline system, let alone

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<sup>15</sup> 14 C.C.R. §§ 15060, 15064

<sup>16</sup> *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. Me. 1992). Federal decisions interpreting NEPA are considered persuasive authority by California courts for the purposes of interpreting CEQA. (For example, see *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 86 (1974)).

<sup>17</sup> 14 C.C.R. § 15064(d)(3).

<sup>18</sup> *Applicant’s Brief on Natural Gas Pipeline Jurisdiction*, p. 9, citing to *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

any evidence that such an effect would result in a change in the physical environment.<sup>19</sup> The fact that no causal relationship exists explains why the Commission has properly not examined the impacts of a project on intrastate and interstate natural gas pipelines in any previous AFC proceeding over the past 35 years. It also explains why a subpoena of PG&E to “testify to the specific condition of Line 002” is not relevant or reasonably necessary to any decision that the Commission must make in this proceeding. Mr. Simpson’s motion to subpoena PG&E was properly denied by the Committee for failure to show good cause.

**C. There is substantial evidence in the record regarding the potential impacts to the public health and safety from MEP’s interconnection to Line 002.**

Applicant provided the testimony from Cesar de Leon, an undisputed expert in natural gas pipeline construction and operations, who testified regarding the safety of Line 002, and the safety of interconnecting MEP to PG&E’s natural gas pipeline system.<sup>20</sup> The allegations in Simpson’s Petition that “the witnesses that testified regarding pipeline safety demonstrated their ignorance of basic facts regarding Line 002” are contrary to the evidentiary record. For example, Mr. de Leon testified to the length of Line 002, when the pipeline was first constructed,<sup>21</sup> the materials used to construct the pipeline,<sup>22</sup> the maximum allowable operating pressure,<sup>23</sup> that he had reviewed the pigging results for Line 002,<sup>24</sup> that he was aware of when the last pigging of Line 002 had occurred,<sup>25</sup> and that in his opinion, “Line 2 is in very good condition.”<sup>26</sup> This testimony is undisputed and constitutes substantial evidence upon which the Commission can make its determination that MEP can be safely and reliably interconnected to the PG&E system.

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<sup>19</sup> For example, see Ex. 301, pp. 4.4-1, 6-7, 14-15.

<sup>20</sup> See, for example, Ex. 69.

<sup>21</sup> 2/25 RT 264.

<sup>22</sup> 2/25 RT 266.

<sup>23</sup> 2/25 RT 271.

<sup>24</sup> 2/25 RT 250:24-25.

<sup>25</sup> 2/25 RT 270.

<sup>26</sup> 2/25 RT 284.

## **II. No prohibited ex parte communication occurred.**

Section 1216 of the Commission's Regulations provides that the ex parte provisions of Government Code sections 11430.10 *et seq.* apply to adjudicative proceedings conducted by the Commission.<sup>27</sup> These provisions serve to prohibit communications among parties to the proceeding "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."<sup>28</sup> For the purposes of the Commission's rules, "presiding officer" is defined to include "all commissioners and all hearing advisers."<sup>29</sup> As discussed below, no prohibited communications occurred.

### **A. Mr. Simpson's motion to subpoena PG&E was denied based on a failure to demonstrate good cause.**

Simpson alleges, without citation to any portion of the Committee's Ruling, that "The Committee wrongly relied on the contents of the ex parte communication and the unsworn testimony, not subject to cross examine, as justification for denying Mr. Simpson's motion."<sup>30</sup> The lack of a citation is not surprising, given the lack of any showing of good cause.

As the Committee's Ruling clearly reveals, Mr. Simpson's motion to subpoena PG&E was denied for failure to show good cause. Significantly, the public comments of Mr. Galati representing PG&E at the March 7, 2011 hearing played no part in the Committee's Ruling. As explained in the Committee's Ruling:

[T]he relevant inquiry for this Committee is whether Mr. Simpson has established good cause to conduct additional Evidentiary Hearings, including the issuance of a subpoena upon PG&E, to address the question of whether the construction, modification and operation of MEP may result in substantial adverse environmental effects as a result of its interconnection with Line 002.<sup>31</sup>

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<sup>27</sup> 20 C.C.R. § 1216(a).

<sup>28</sup> Cal. Govt. Code § 1143.10.

<sup>29</sup> 20 C.C.R. § 1216(a).

<sup>30</sup> Simpson's Petition, p. 7.

<sup>31</sup> Committee's Ruling, p. 2.

The Committee's Ruling then evaluated the testimony provided at evidentiary hearings by three witnesses: Cesar de Leon, Rick Taylor, and Bob Sarvey.<sup>32</sup> No other testimony was sponsored by any other party, including Mr. Simpson, on the issue, despite the Committee's admonition in its Notice of Prehearing Conference and at the Prehearing Conference for all parties to present their evidence, if any, for the Committee's consideration.<sup>33</sup>

Given the expert testimony sponsored by Mr. Tyler and Mr. de Leon, it is wholly unremarkable that the Committee's Ruling found that Mr. Simpson had failed to establish good cause for issuing a subpoena to PG&E:

[T]he Committee has determined that the two witnesses called [Mr. Tyler and Mr. de Leon] possess the expertise needed to testify regarding the impacts of the MEP on the PG&E pipeline. We also note that Mr. Simpson and the other intervenors had a full and fair opportunity to conduct cross-examination [of] both of those witnesses. We find that there is sufficient evidence in the record regarding the potential impacts to the public health and safety from MEP's interconnection to Line 002...Without a specific declaration describing the clear value of additional testimony from PG&E and coupled with the untimely motion for the subpoena, [the] scale tips in favor of the Applicant all the more. For all the foregoing reasons, we find that the request lacks good cause.<sup>34</sup>

Notably, no part of the Committee's Ruling relies on Mr. Galati's statements during the March 7 evidentiary hearing as a basis for its ruling. Mr. Simpson completely and utterly failed to meet his burden of showing good cause, and the Committee's Ruling must stand.

**B. Intervenor Simpson has not met his burden to establish that a prohibited ex parte communication occurred.**

The *Declaration of Rob Simpson* states that Mr. Simpson "observed Hearing Officer Celli speaking with a man in the hall" and that Hearing Officer Celli "identified the man he had been speaking to in the hall as Scott Galati, counsel for PG&E."<sup>35</sup> Based on this "observation" and nothing more, Simpson's Petition then accuses Hearing Officer Celli of "engage[ing] in prohibited ex parte

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<sup>32</sup> Committee's Ruling, pp. 2-5.

<sup>33</sup> Committee's Ruling, pp. 2-5.

<sup>34</sup> Committee's Ruling, p. 6.

<sup>35</sup> *Declaration of Rob Simpson*, provided with the Simpson Petition.



communication.”<sup>36</sup> Notwithstanding the wholly unsupported assertions that “Government Code section 11430.10 clearly prohibits the behavior that took place at the March 7, 2011”<sup>37</sup>, Simpson’s Petition does not explain how Government Code section 11430.10 applies on these facts. Nor does Simpson’s Declaration provide any evidence to his Petition that “prohibited” communication took place. There is no evidence that the conversation concerned any substantive matter at issue in this proceeding. In fact, the evidence in the record is to the contrary.

**C. Even if the Commission’s ex parte rules applied, discussions related to procedural matters are not prohibited.**

Even assuming that the Commission’s ex parte rules apply to the communication that occurred between Hearing Officer Celli and Mr. Galati, it is clear from the March 7, 2011 evidentiary hearing transcripts that a “prohibited ex parte communication” did not occur.

Government Code section 11430.20 specifically permits communications concerning “a matter of procedure or practice.”<sup>38</sup> The communication at issue concerned why Mr. Galati was present at the evidentiary hearings, whether Mr. Galati could address the parties regarding PG&E’ position, and PG&E’s potential response to a subpoena.<sup>39</sup> By their very nature, these are all procedural matters; none go to the merits of the MEP application. Neither Mr. Galati nor Hearing Officer Celli discussed the merits of any substantive issue in the proceeding. Such communication is permissible under Government Code section 11430.20 because the communication concerned a “matter of procedure or practice.” No prohibited communications took place.<sup>40</sup>

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<sup>36</sup> Simpson’s Petition, p. 1.

<sup>37</sup> Simpson’s Petition, p. 6.

<sup>38</sup> Cal. Govt. Code § 11430.20(b).

<sup>39</sup> 3/7 RT 346.

<sup>40</sup> Moreover, Government Code subsection 11430.10(a) prohibits communications “*to* the presiding officer *from* an employee or representative of an agency that is *a party* or *from* an interested person outside the agency.”<sup>40</sup> The use of the words “to” and “from” are significant. As explained in the comments from the Law Revision Commission, “[w]hile this section precludes an adversary from communicating with the presiding officer, it does not preclude the presiding officer from communicating with an adversary.”<sup>40</sup> As described in the March 7, 2011 evidentiary hearing transcripts, the communications from Hearing Officer to Mr. Galati fall within the scope of this Law Revision Commission comment, and no violation of the ex parte rules occurred.

**D. No testimony was proffered by PG&E.**

Simpson's Petition accuses Hearing Officer Celli of "allow[ing] the witness [Mr. Galati] to testify without being sworn."<sup>41</sup> This accusation is belied by the portions of the evidentiary hearing transcripts cited in Intervenor Simpson's own petition.<sup>42</sup> Hearing Officer Celli clearly explained, several times, that Mr. Galati was not a witness, and would not be providing testimony.<sup>43</sup> Thus, Simpson's accusations that Hearing Officer Celli allowed Mr. Galati to "testify" are baseless.

**E. Contrary to Mr. Simpson's assertions, the communication was made a part of the record.**

Simpson's Petition also alleges that, "When the Hearing Officer was challenged on the ex parte communication, the Hearing Officer violated Government Code section 11430.50 by refusing to make the communication part of the record."<sup>44</sup> This accusation is also without merit. Hearing Officer Celli is not required to make non-ex parte communications a part of the record.

Moreover, even though the communication was not an ex parte communication, the communication was nevertheless made a part of the record, consistent with the requirements of the Government Code.<sup>45</sup> When Hearing Officer Celli was "challenged" on the issue of whether an ex parte communication occurred, Hearing Officer Celli explained that the communication was not an ex parte communication, and provided Intervenor Simpson the opportunity to ask further questions regarding the communication.<sup>46</sup> Furthermore, both Mr. Galati and Hearing Officer Celli described the details of their

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<sup>41</sup> Simpson's Petition, p. 4.

<sup>42</sup> For example, see Simpson's Petition, p. 3 (citing to 3/7 RT 343:6-33:13, "HEARING OFFICER CELLI: No. He's not a witness."); p. 5 (citing to 3/7 RT 346:22-347:4, "HEARING OFFICER CELLI: You know, something? He's here voluntarily. He's not a witness.").

<sup>43</sup> 3/7 RT 343, 346.

<sup>44</sup> Simpson's Petition, p. 6.

<sup>45</sup> Cal. Govt. Code § 11430.40 *et seq.*

<sup>46</sup> 3/7 RT 344.

MR. SIMPSON: May I have a point of order? Two things, really. Was there ex parte communication between the Commission and Mr. Galati?

HEARING OFFICER CELLI: He's not a party. So the answer is no. Any other questions?

MR. SIMPSON: Yes. Has he been sworn?

HEARING OFFICER CELLI: No. He's not a witness.

short communication on the record.<sup>47</sup> Thus, there is no violation, and even assuming, *arguendo* that this was not the case, Hearing Officer Celli following the requirements of the Government Code by describing the procedural nature of the communication on the record before the parties, affording process that they are due under the California Government Code.

### **CONCLUSIONS**

The requested subpoena requests information that is not necessary or relevant to any decision that the Commission must make in the certification of MEP. No prohibited *ex parte* communication occurred. Mr. Simpson's motion to subpoena PG&E was denied based on a failure to demonstrate good cause. He cannot and has not cured that failure with his Petition.

The Petition should be denied.

Dated: April 15, 2011

ELLISON, SCHNEIDER & HARRIS L.L.P.

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<sup>47</sup> 3/7 RT 403.

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**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on April 15, 2011, I served the attached *Opposition to Petition for Reconsideration of Intervenor Rob Simpson* via electronic mail and U.S. Mail to all parties on the attached service list.

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



\_\_\_\_\_  
Karen A. Mitchell

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