

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

Application for Certification for the  
Mirant Marsh Landing Generating Station Project

Docket No. 08-AFC-3

**APPLICANT'S OPPOSITION TO THE LATE-FILED  
PETITION TO INTERVENE OF ROBERT SARVEY**

June 11, 2010

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**I. INTRODUCTION**

Pursuant to the Committee's direction issued on June 4, 2010, Mirant Marsh Landing, LLC, the applicant in this proceeding ("Mirant Marsh Landing"), submits this response in opposition to the late-filed petition to intervene of Robert Sarvey. Section 1207(b) of the Commission's regulations and the Committee's Notice of Prehearing Conference and Evidentiary Hearing dated May 26, 2010 ("Hearing Notice") established 5:00 p.m. on June 1, 2010 as the deadline for submitting a petition to intervene in this proceeding. Mr. Sarvey did not meet that deadline. Mr. Sarvey instead filed his petition on the afternoon of June 4, 2010, three days after the deadline. His petition therefore must be treated as a late-filed petition to intervene.

Section 1207(c) of the Commission's regulations specifies that the Presiding Member may grant a late-filed petition to intervene only upon a showing of "good cause" by the petitioner. The Hearing Notice placed members of the public on notice that late-filed petitions to intervene in this proceeding will not be granted absent a showing of "extraordinary good cause." Mr. Sarvey has failed to meet his burden to demonstrate that extraordinary good cause, or any good cause, exists to allow his late intervention. In fact, Mr. Sarvey has not provided any valid excuse for missing the deadline, as explained below. Mr. Sarvey's late-filed petition to intervene therefore must be denied.

Allowing Mr. Sarvey's late intervention at this advanced stage in the proceeding would prejudice the applicant, undermine the integrity of the Commission's procedural rules, and condone the practice of waiting until the last possible moment to intervene, as also explained below. For all of these reasons, Mr. Sarvey's late-filed petition to intervene should be denied.

## II. DISCUSSION

### A. **Mr. Sarvey has not met his burden to demonstrate that extraordinary good cause, or any good cause, exists to allow his late intervention.**

Mr. Sarvey has not provided any valid excuse for missing the deadline for intervention. Mirant Marsh Landing filed its Application for Certification (“AFC”) more than two years ago and the Commission issued its data adequacy determination on September 24, 2008. Mr. Sarvey has had more than 20 months to intervene, but he has elected not to do so. In his response to the Committee’s questions on June 8, 2010, Mr. Sarvey stated that he “visit[s] the CEC website about once a week.” Yet he has ignored numerous opportunities for public comment and participation in this proceeding. In addition to the December 2008 initial informational hearing and site visit, Staff conducted workshops in December 2008, October 2009, and most recently on May 4, 2010. Each of these workshops was preceded by a formal notice inviting public participation that was posted on the Commission’s website. Members of the public had the opportunity to attend these events in person or to participate via telephone. Mr. Sarvey never participated in any of those events. Staff also solicited comments on its Staff Assessment issued April 26, 2010 in a notice that was posted on the Commission’s website. Mr. Sarvey elected not to submit comments on the Staff Assessment, which were due on May 26, 2010. The Committee also held a status conference in this proceeding on May 12, 2010 and alerted the public in a notice posted on the Commission’s website. Members of the public had the opportunity to attend the status conference in person or to participate via WebEx or telephone. Mr. Sarvey elected not to participate in the status conference. Having allowed all of these opportunities to pass, Mr. Sarvey cannot credibly claim that extraordinary good cause, or any good cause, exists for granting his late-filed petition to intervene.

Mr. Sarvey has long been aware of this proceeding and the progress being made here. He admits that he has been participating in the California Public Utilities Commission (“CPUC”) proceeding in which the CPUC is reviewing the power purchase agreement for the Marsh Landing Generating Station (“MLGS”). Mr. Sarvey has submitted testimony and briefs in the CPUC proceeding on behalf of CARE, an organization in which he serves as an officer. In the CPUC proceeding, Mr. Sarvey provided opening testimony on February 22, 2010, reply testimony on March 10, 2010, and briefs on April 14, 2010 and April 22, 2010. He discussed the MLGS in all of these documents, and in several places he cited the September 2009 AFC

amendment filed by Mirant Marsh Landing in this proceeding.<sup>1</sup> In his briefs filed at the CPUC, Mr. Sarvey also quoted conditions contained in the Preliminary Determination of Compliance (“PDOC”) for the project that was released on March 24, 2010 by the Bay Area Air Quality Management District (“BAAQMD”).<sup>2</sup>

Mr. Sarvey also admits that he has submitted comments on this project’s PDOC to the BAAQMD. In those comments, Mr. Sarvey references this proceeding in several places, indicating that he has examined the “real facts in the permitting record, CEC documents and other publicly available documents.”<sup>3</sup> Mr. Sarvey’s participation and testimony in the CPUC proceeding and his comments on the PDOC demonstrate that he has been well aware of what was happening in this proceeding and was actively reviewing the documents filed by Mirant Marsh Landing and staff. As noted above, Mr. Sarvey has stated that he “visit[s] the CEC website about once a week.”

Mr. Sarvey also admits that he has familiarity and experience with the Commission’s licensing process and the associated requirements and procedures. In his response to the Committee’s questions on June 8, 2010, Mr. Sarvey states that he has “participated in about 20 siting cases.” As a partial list of examples, Mr. Sarvey has participated in licensing proceedings for Contra Costa Unit 8 Power Project (Docket 00-AFC-1), East Altamont Energy Center (Docket 01-AFC-4), Tracy Peaker Project (Docket 01-AFC-16), Tesla Power Project (Docket 01-AFC-21), Los Esteros Critical Energy Facility II Phase 2 (Docket 03-AFC-2), Modesto Irrigation District Electric Generation Station Ripon (Docket 03-SPPE-1), San Francisco Electric Reliability Project (Docket 04-AFC-01), Eastshore Energy Center (Docket 06-AFC-06), GWF Tracy Combined Cycle Power Plant Project (Docket 08-AFC-07). Mr. Sarvey is

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<sup>1</sup> Opening Testimony of Robert Sarvey for Californians for Renewable Energy, Inc. (CARE) in CPUC Docket No. 09-09-021, filed February 22, 2010 and available at [https://www.pge.com/.../LongTermRFO-Solicitation2008-II\\_Plea\\_CARE\\_20100310-01.doc](https://www.pge.com/.../LongTermRFO-Solicitation2008-II_Plea_CARE_20100310-01.doc); Reply Testimony of Robert Sarvey for Californians for Renewable Energy, Inc. (CARE) in CPUC Docket No. 09-09-021, filed March 10, 2010 and available at [https://www.pge.com/regulation/LongTermRFO-Solicitation2008-II/Hearing-Exhibits/CARE/2010/LongTermRFO-Solicitation2008-II\\_Exh\\_CARE\\_20100407-Exh402.pdf](https://www.pge.com/regulation/LongTermRFO-Solicitation2008-II/Hearing-Exhibits/CARE/2010/LongTermRFO-Solicitation2008-II_Exh_CARE_20100407-Exh402.pdf); Opening Brief of Californians for Renewable Energy, Inc. (CARE) in CPUC Docket No. 09-09-021, filed April 14, 2010 and available at <http://docs.cpuc.ca.gov/EFILE/BRIEF/117186.pdf> (“CARE Opening Brief”).

<sup>2</sup> CARE Opening Brief; Reply Brief of Californians for Renewable Energy, Inc. (CARE) in CPUC Docket No. 09-09-021, filed April 22, 2010 and available at [https://www.pge.com/regulation/LongTermRFO-Solicitation2008-II/Pleadings/CARE/2010/LongTermRFO-Solicitation2008-II\\_Plea\\_CARE\\_20100422-02.pdf](https://www.pge.com/regulation/LongTermRFO-Solicitation2008-II/Pleadings/CARE/2010/LongTermRFO-Solicitation2008-II_Plea_CARE_20100422-02.pdf).

<sup>3</sup> Applicant Responses to Public Comments Received Regarding Preliminary Determination of Compliance for the Marsh Landing Generating Station, “Response to Comments Received from Robert Sarvey”, p. 30.

also an intervenor in the pending Mariposa Energy Project (Docket 09-AFC-03) and Oakley Generating Station (Docket 09-AFC-04) proceedings, both of which were filed well after this AFC. As a recurring participant in Commission licensing proceedings, Mr. Sarvey must be required to comply with procedural deadlines.

Mr. Sarvey knew that this proceeding was advancing and he knew how to intervene, but he was deliberately waiting until the last possible moment to do so. He acknowledges this in his petition when he says “petitioner has been awaiting the Final Staff Assessment and the FDOC and intended to evaluate both prior to applying for intervention.” Mr. Sarvey may have miscalculated when the last possible time for intervention would occur, but this oversight does not constitute extraordinary good cause (or any good cause) for granting his deliberate late intervention. Moreover, the practice of intentionally waiting until the last possible time to intervene is prejudicial to the applicant and disruptive to the Commission’s licensing process, as explained in Section B below.

Mr. Sarvey’s claim that he was waiting for a Final Staff Assessment (“FSA”) is also not credible. Staff has long proposed to issue a Staff Assessment rather than a Preliminary Staff Assessment (“PSA”) and FSA. This intent was communicated in status reports filed by staff and Mirant Marsh Landing and posted on the Commission’s website.<sup>4</sup> Moreover, the Staff Assessment issued on April 26, 2010 was not labeled as preliminary, and very clearly explained that it was not preliminary and that staff intended for it to reflect staff’s final conclusions and recommendations for the project:

Staff typically prepares both a preliminary and final staff assessment. However, to adhere to agreed upon timelines for this project, staff will prepare a SA only. The SA presents for the applicant, interveners, agencies, other interested parties, and members of the public, **the staff’s final analysis, conclusions and recommendations.**<sup>5</sup>

In his response to the Committee’s questions on June 8, 2010, Mr. Sarvey stated that he has “participated in about 20 siting cases, [and has] only not seen a FSA in SPPE proceedings.”

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<sup>4</sup> See Staff’s Status Report #6 dated February 17, 2010 and Staff Status Report #7 dated April 15, 2010, and Mirant Marsh Landing’s Eighth Status Report dated March 3, 2010, and Mirant Marsh Landing’s Ninth Status Report dated April 28, 2010.

<sup>5</sup> Marsh Landing Generating Station, Staff Assessment (08-AFC-3), April 2010, Introduction, pp. 2-2 through 2-3 (emphasis added).

This is no excuse for ignoring the clear direction in the Staff Assessment. This is also not the first time that staff has followed the approach of issuing a Staff Assessment instead of a PSA and FSA. Staff issued a Staff Assessment in the Lodi, Genesis, Orange Grove, Solar Millenium, Abengoa Mojave Solar, and Imperial Valley Solar proceedings. As someone who regularly participates in Commission licensing proceedings and visits the Commission's website on a weekly basis, Mr. Sarvey cannot credibly claim that issuance of a Staff Assessment instead of a PSA and FSA was an unfair surprise. Staff's issuance of a Staff Assessment rather than a PSA and FSA is permissible under the Commission's rules, was mentioned several times in public documents, and does not provide good cause justifying Mr. Sarvey's late intervention. Even if a PSA and FSA were published, the time to provide meaningful and constructive comments is during the public comment period for the PSA, not after the FSA is published.

Mr. Sarvey also has not demonstrated that denial of intervention would prevent him from commenting on his areas of primary concern. In his petition, Mr. Sarvey states that he is interested in the project based on his concerns about potential air quality impacts in Tracy, where he lives, based on his assertion that "CEC staff, ARB, and the BAAQMD determined in the East Altamont Energy Center Proceeding 01-AFC-4 that 70% of all emissions emitted in the Contra Costa area impact Tracy." Mr. Sarvey ignores the fact that the Commission rejected staff's recommendation in the East Altamont Energy Center ("EAEC") proceeding that a 70% effectiveness factor be applied to emission reduction credits from the Antioch area for purposes of mitigating EAEC emissions, concluding that "we find no logical basis for a 70% factor and again do not think the methodology is established well enough to override BAAQMD decisions."<sup>6</sup>

Mr. Sarvey has already addressed air quality issues in his comments on the PDOC. Mirant Marsh Landing addressed his comments in detail in its responses to PDOC comments, which were docketed in this proceeding on June 4, 2010. Mr. Sarvey's comments also will be addressed by BAAQMD when the FDOC is issued. Commission staff has also confirmed that staff considered Mr. Sarvey's PDOC comments in preparing the Revised Staff Assessment issued yesterday.

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<sup>6</sup> Commission Decision, East Altamont Energy Center, Docket 01-AFC-4, p. 144. Mr. Sarvey made a similar assertion in his comments on the PDOC in reference to the Tesla Power Project (Docket 01-AFC-21). Mirant Marsh Landing explained that the determination he cites is not accurate as applied to MLGS and concerned circumstances unique to Tesla.

Mr. Sarvey's comments on the PDOC also address the topic areas cited in his response to the Committee's questions on June 8, 2010. He states that he is interested in issues associated with environmental justice related to public health, air quality and hazardous material transportation issues; energy efficiency and alternatives; and project design. However, he has already addressed these topics in his comments on the PDOC and they have been addressed by Mirant Marsh Landing and staff and will be addressed in the FDOC. Mr. Sarvey thus has not demonstrated that extraordinary good cause (or any good cause) exists to allow his late intervention in this proceeding.

**B. Granting Mr. Sarvey's late-filed petition would prejudice Mirant Marsh Landing, undermine the integrity of the Commission's rules, and condone deliberate last minute interventions.**

This proceeding has been underway for more than 20 months since the Commission made its data adequacy decision (and more than 24 months since its original filing date) and is at a very advanced stage. Mirant Marsh Landing has invested substantial amounts of time and money to develop the project and to advance this case toward a final certification decision. Mirant Marsh Landing also has explained the time constraints affecting this project and the need for a Commission decision by the end of August. These time constraints arise from contractual commitments that are in place to support construction of the project, including the power purchase agreement, a turbine supply agreement, and an engineering, procurement, and construction contract. Recognizing these constraints, Mirant Marsh Landing and staff have worked diligently to advance this case to its current status with a prehearing conference and evidentiary hearing scheduled to take place on July 1, 2010.

Allowing Mr. Sarvey's late intervention has the potential to burden Mirant Marsh Landing and could cause a delay in this proceeding, especially if Mr. Sarvey is allowed to raise new issues based on the Revised Staff Assessment or Mirant Marsh Landing's testimony that would require additional testimony or hearing time to address. This is unfair and prejudicial to the applicant in light of how much time Mr. Sarvey has had to participate.

Interested parties have every right to participate in Commission licensing proceedings and their participation should be encouraged, but they must be required to comply with deadlines and procedural rules. Excessive leniency in the application and enforcement of those rules,

particularly when parties like Mr. Sarvey wait as long as possible to comment, threatens to undermine the integrity of the Commission's process.

Granting Mr. Sarvey's late intervention also would condone and potentially encourage his admitted tactic of waiting until the last moment to intervene. Mr. Sarvey has filed late petitions to intervene in at least two other siting proceedings.<sup>7</sup> Parties who wish to participate in a licensing case should be encouraged to intervene and present their comments and concerns at the earliest possible time so that staff and the applicant can consider those comments and concerns in an orderly fashion. This message is clear in the Commission's *Public Participation in the Siting Process: Practice and Procedure Guide*, which warns that late intervention may not be allowed:

It is important to intervene as early as possible in the proceeding. Waiting may mean that opportunities to raise important issues may be missed. If there are no intervenors, issues may be resolved solely between the staff and the applicant. The committee may not allow a late intervenor to revisit matters resolved before the intervention.<sup>8</sup>

The tactic of deliberately waiting until the last possible moment to file an intervention seems intended to cause delay, rather than to provide a meaningful contribution to the analysis and decision making processes. Allowing Mr. Sarvey to intervene at this late stage may encourage parties to intervene after the deadline in future proceedings.

**C. If his late intervention is allowed, Mr. Sarvey should be prohibited from raising new issues or delaying the schedule and other parties should have the opportunity to file rebuttal testimony.**

Mirant Marsh Landing urges the Committee to deny Mr. Sarvey's late intervention for all of the reasons discussed above. There is no showing of extraordinary good cause (or any good cause) for allowing Mr. Sarvey's late intervention and there are ample grounds for denying it. If, however, the Committee were to grant Mr. Sarvey's late intervention, certain conditions are needed to avoid undue prejudice to the applicant. Specifically, Mr. Sarvey should be directed to comply with the following: (i) Mr. Sarvey must accept the status of the proceeding and the

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<sup>7</sup> See Mr. Sarvey's Petition to intervene in the Eastshore Energy Center (Docket 06-AFC-06) and Los Esteros Critical Energy Facility II Phase 2 (Docket 03-AFC-2).

<sup>8</sup> Public Participation in the Siting Process: Practice and Procedure Guide, California Energy Commission, December 2006, p. 55.

record as they currently exist, including the current lack of disputed issues; (ii) given his ample prior opportunities to intervene and obvious knowledge of the proceeding, Mr. Sarvey will not be permitted to raise any new issues in this proceeding and shall be limited to presenting the comments he has made on the PDOC; and (iii) Mr. Sarvey must comply with the schedule set forth in the Hearing Notice and he will not be permitted to delay the schedule or extend the allotted time for the evidentiary hearing.

Mirant Marsh Landing also requests that parties be given the opportunity to submit rebuttal testimony to address anything that Mr. Sarvey may raise in his testimony. Mirant Marsh Landing requests that rebuttal testimony be allowed on June 28, 2010.

### III. CONCLUSION

As explained above, Mr. Sarvey has not met his burden to demonstrate that extraordinary good cause, or any good cause, exists to allow his late intervention. His late-filed petition to intervene therefore must be denied.

June 11, 2010

Respectfully submitted,



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Lisa A. Cottle

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**DECLARATION OF SERVICE**

I, Lisa A. Cottle, declare that on June 11, 2010, I served and filed copies of the attached *Applicant's Opposition to the Late-Filed Petition to Intervene of Robert Sarvey (Docket No. 08-AFC-3)*. The original document filed with the Docket Unit is accompanied by a copy of the most recent Proof of Service list, located at the web page for this project at <http://www.energy.ca.gov/sitingcases/marshlanding/index.html>. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

- For service to all other parties: Sent electronically to all email addresses on the Proof of Service list; and by depositing in the United States mail at San Francisco, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked as "email preferred."

**AND**

- For filing with the Energy Commission: Sent an original paper copy and one electronic copy, mailed and emailed respectively, to the address below:

**CALIFORNIA ENERGY COMMISSION**

Attn: Docket No. 08-AFC-3  
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I declare under penalty of perjury that the foregoing is true and correct.



\_\_\_\_\_  
Lisa A. Cottle



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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**APPLICATION FOR CERTIFICATION  
FOR THE MARSH LANDING  
GENERATING STATION**

**Docket No. 08-AFC-3**

**PROOF OF SERVICE  
(Revised 4/19/2010)**

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