

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

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Application for Certification
For the San Francisco
Electric Reliability Project

Docket No. 04-AFC-1

**Comments and objections of CARE to
Presiding Member's Proposed Decision**

In behalf of Intervener CALifornians for Renewable Energy, Inc. (CARE) we hereby file the following comments and objections to the Presiding Member's Proposed Decision.

Introduction

In brief, CARE rejects and objects to Presiding Member's Proposed Decision because it will site the SFERP project in an area acknowledged for its environmental justice sensitivities which violates the "equal protection" mandates of the Federal and State Constitutions. The Proposed Decision does this by illegally minimizing and completing a piecemeal analysis of the impacts attributable to SFERP. CARE contends the Presiding Member's Proposed Decision provides further evidence of the CEC's intent to discriminate against CARE's low-income minority members and to further retaliate against them for bringing a June 21, 2003 US DOE OCRD Title VI Complaint against the CAISO, Applicant, and the California Energy Commission [CEC] (File No: 03-003-HQ) over the Commission, CAISO's, and Applicant's proposed siting of the SFERP in the immediate vicinity of the disparately impacted low income community of color, Bay View Hunters Point in San Francisco.

Procedural Matters

On August 25, 2006 the Commission posted its Presiding Member's Proposed Decision (PMPD). The copy posted that day was missing pages 17 to 29 which contained the entire "Project Alternatives". Without any notice to the public of errata on the PMPD

on August 28, 2006 the PMPD appeared on the Commission's web site with the missing section included. While by itself this seems rather innocuous when combined with other Commission approved actions by the Commission staff and the Applicant including acceptance of late filed briefs that violate CARE's rights this demonstrates a pattern of discrimination against CARE's members based on their race and income.

The PMPD erroneously states [at page 1] "that the proposed San Francisco Electric Reliability Project (SFERP) complies with all applicable laws, ordinances, regulations, and standards, and may therefore be licensed." CARE objects to such finding because the Commission has failed to recognize and carry out its duties under Title VI of the Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6, and Section 65040.12 (c) of the California Government Code which requires the CEC to provide "fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies" as well as the "equal protection" mandates of the Federal and State Constitutions, and therefore deny the proposed project at this proposed site due to its location in the disparately impacted low income community of color, Bay View Hunters Point in San Francisco.

In fact the PMPD serves to further illustrate the conspiracy by the CEC in concert with the Bay Area Air Quality Management District (BAAQMD), the San Francisco Bay Regional Water Quality Control Board (SFBRWQCB or Regional Board), and the California Independent System Operator (CAISO), to deprive CARE's members of these statutory, civil, and constitutional rights, based on their race and income. The PMPD claim that these agencies merely "cooperated" with the CEC to deprive our members' rights is fraudulent, at best.

On August 14, 2006 the Applicant served a copy of a 79 page letter sent that day to the DWR from Barbara Hale of the SFPUC in response to DWR Questions, about the project. On August 23, 2006 CARE received this filing listed as docket log#37668 only after requesting it by e-mail on August 22, 2006. CARE also requested this document be served on the Parties, which never took place. This document discloses that the Applicant, representatives of the California Department of Water Resources (CDWR) and CAISO carried out the public's business in secret, on August 4, 2006, without an

opportunity for Interveners or the public to participate in these significant changes to the SFERP's description, design, and conditions of operation.

An example of the significance of the design change comes from the additional requirement that "the minimum amount of power that the SFERP must produce to meet the CAISO Action Plan requirements is 48 MW per turbine, for a total of 192 MW. In order to meet the CAISO requirement, chillers will be required on all four turbines....Our current design would guarantee a total output of 190.7 MW." [SFPUC letter to Mr. Haines at page 2]

Based on a meeting at CAISO on August 4, that included: Chuck Toney, Dave Alexander, and Jaime Medina, representing CDWR; Karen Kubick, of my staff; and Larry Tobias of CAISO, an agreement was reached, that the minimum amount of power that the SFERP must produce to meet the CAISO Action Plan requirement is 48 MW per turbine, for a total of 192 MW. In order to meet the CAISO requirement, chillers will be required on all four turbines. See the attached correspondence from Karen Kubick of the SFPUC to Chuck Toney of the CDWR, dated August 8, 2006. Our current design would guarantee a total output of 190.7 MW. The SFPUC is initiating a review to optimization design to identify the modifications and associated cost with increasing the total output by 1.3 MW.

There exists no evidence in the record to examine the impacts of running the four turbines in excess of their performance guarantees by the turbine vendor. No analysis of the affect of the chillers on the estimates of ground level fine particulate matter (PM2.5) produced by the entire four turbine project along with PM10, VOCs, NOx, SOx, and Toxic Air Contaminants that will all have increased emission levels as a result of the Applicant's unproven design. It isn't surprising to us that the Commission would seek to obscure such information from the public view when the CEC never put CARE's briefs on its website for the public to read. Isn't that another piece of evidence showing that the CEC intends to discriminate against the low income, minority community of Bay View Hunters Point in San Francisco? There is no document on the website discussing this issue except for the CEC's documents. Since the CEC refuses to put these issues on the website, the public meeting scheduled for September 25 is a joke. The Commission has never demonstrated the burden of providing the public access through a telephone connection to its meetings on this project in Sacramento. The Commission has a duty under Title VI of the Civil Rights Act of 1964 to accommodate CARE's participation as well as the low-income people of color members who CARE uniquely represents in this

proceeding. The provision of phone access to meetings in Sacramento on this project is therefore a duty of the CEC, and not that of CARE, or other members of the public.

Another example of what a farce the PMPD is also comes from the Applicant's August 14, 2006 letter to CDWR that apparently points out that "in order for the SFERP to maintain site control, the project must be compliant with Federal Aviation Administration (FAA) regulations, providing for an 'Airport purpose',...A direct connection to the Airport's power grid has been included in the SFERP to provide back-up power in the event of a regional outage. It is intended that this intertie would only be used in the event of an area wide outage of the PG&E grid.....The Airport required a direct connection to meet the FAA requirement of an 'Airport purpose,' and to provide the regional benefit stimulated above." [SFPUC letter to Mr. Haines at page 5]

The Airport has made it clear that in order for the SFERP to maintain site control, the project must be compliant with the Federal Aviation Administration (FAA) regulations, providing for an "Airport purpose", see the attached letter from John Martin SFIA Director to Susan Leal SFPUC General Manager, dated May 5, 2005. The Airport benefit realized will ensure that during and after an emergency the SFIA will function to support the region. A direct connection to the Airport's power grid has been included in the SFERP to provide back-up power in the event of a regional outage. It is intended that this intertie would only be used in the event of an area wide outage of the PG&E grid. The Airport and SFPUC Commissions approved a memorandum of understanding (MOU), April 30, 2004, allowing the SFERP to be sited at the airport. The MOU, which is provided as an attachment, stipulates that the SFPUC recognizes the FAA requirements and the intent to use the SFERP to supply emergency backup electric service to the Airport.

During the alternatives analysis phase, it was determined that PG&E, in cooperation with CAISO, could not guarantee response in time to allow for the transmission of energy through the PG&E grid within the allotted 30 minute minimum time frame, and that the preferred alternative would allow the Airport to be isolated from the PG&E system. Without system isolation, PG&E would require a minimum of 4 hours when there is a grid outage. PG&E would not provide a guaranteed time frame for response, see attached PG&E Supplemental Facilities Study, November 9, 2004 (Section 5.1.1). The Airport rejected all concepts that required dependence upon PG&E that would make the Airport reliant upon PG&E's undefined regional priorities in times of an electrical emergency. The Airport required a direct connection to meet the FAA requirement of an "Airport purpose," and to provide the regional benefit stimulated above.

The [SFPUC letter to Mr. Haines at page 6] estimates that it will cost the Applicant and additional \$5,248,000 for the required transmission system upgrades including \$348,000 for a diesel generator without any impact analysis in the record. Therefore there is no reason that we are aware of, other than intent to discriminate against CARE's low income people of color members, NOT to require the Applicant to site all four turbines at the

SFIA, and require them to construct a transmission interconnect between the SFIA and the Potrero substation.

The CEQA Guidelines require an evaluation of the comparative merits of “a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the project objectives” (Cal. Code Regs., tit. 14 §15126.6). The objectives of the applicant are listed on page 18 of the PMPD. These objectives are:

- Improve CCSF’s electricity reliability;
 - Facilitate the shutdown of older, more polluting in-City generation; and
 - Minimize local impacts of electrical generation.
- [PMPD at page 18]

The evidence of the record is that The Trans Bay Cable Project would likely have the least environmental impacts overall. (Exhibit 46 p. 6.1, PMPD p. 22) “The evidence of record establishes that infrastructure improvements – a combination of both generation and transmission – are necessary to preserve electrical reliability in San Francisco. (Ex. 50, see Local System Effects section infra.) No evidence of record credibly challenges this fact. (PMPD page 15)” The SFERP in and of itself will not achieve the Applicants stated purpose of achieving electrical reliability. To achieve the Applicant’s goal of minimizing local impacts from electrical generation the Transbay Cable project is clearly superior. The PMPD eliminates the Transbay cable project as the preferred alternative because by itself it would not meet CAISO requirements for generation north of the Martin Substation. (Ex. 46, pp. 6-1, 6-25, 6-34, 6-36, 6-42.) The Cal-ISO requirement is that the SFERP must provide 100 MW of in city generation in all contingencies to release the Potrero 3 unit from its RMR contract. The SFERP in of itself does not meet that requirement it requires the siting of a fourth turbine at the airport. The impacts of that turbine are not analyzed in the application or in the alternatives analysis. Also the record reflects that even with the fourth turbine at the airport the project will not meet the Cal-ISO generation standard of 100 MW to achieve the projects objective of closing the Potrero 3 unit. (RT 5-31 -06 p. 64 lines 8-19) As the PMPD states that “as also discussed in other portions of this Decision, certification of the SFERP does not necessarily result in the closure of the existing Potrero units. While the SFERP may “facilitate” or “create the opportunity” for such closure, the evidence is clear that “...only the power plant owner (Mirant) can decide to retire their generator units.” (Ex. 50, p. 3,

lines 21-22.) The SFERP like the Transbay cable and the SFIA alternative does not provide for the closure of the Potrero 3 unit in and of itself so the Transbay cable is the environmentally preferred alternative because it meets more of the projects objectives (minimizing the impacts of local generation) than the SFERP. The SFIA alternative is also superior to the SFERP because it would also reduce the impacts of local generation and increase reliability. None of the alternatives meet the CAISO conditions to shut down the Potrero Power Plant. The PMPD must reject the SFERP unless the commission wishes to provide overriding considerations. (Cal. Code Regs., tit. 14 §15126.6).

The PMPD [at page 7] makes the erroneous claim that at “these publicly noticed hearings all parties were afforded the opportunity to present evidence, cross examine witnesses, and rebut the testimony of other parties, thereby creating an evidentiary basis for this Commission Decision” when in fact the very opposite is true. Despite the fact that the Commission granted CARE’s financial hardship in participating in this proceeding and despite CARE’s repeated requests for telephone access the Commission failed accommodate CARE and provide telephone access knowing full well that we could not afford to travel to Sacramento for the April 27, 2006 and May 1, 2006 evidentiary hearings. CARE also requested phone access repeatedly for the general public as well. How then can the PMPD be allowed to claim “hearings also allowed all parties to argue their positions on disputed matters and provided a forum for the Committee to receive comments from the public and other governmental agencies” when no accommodations where made to enable participation of CARE as Intervener with financial hardship or the general public, for that matter, at the Sacramento April 27, 2006 and May 1, 2006 evidentiary hearings? This too illustrates the Commission has failed to recognize and carry out its duties under Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code” as well as the “equal protection” mandates of the Federal and State Constitutions.

Deferring mitigation until after the project is approved’ denies public input to the decision-making process and amounts to a ‘piecemeal’ analysis prohibited by CEQA

The Commission has allowed the siting Committee to lose control over the appropriate level of public participation that must be afforded to the public and interveners to preserve these fore mentioned statutory, civil, and constitutional rights, by allowing the Applicant, the Commission Staff, and the Staff of the San Francisco Bay Regional Water Quality Control Board (SFBRWQCB) to conduct meetings in secret and carry out the public's business without any opportunity for public participation. The PMPD [at pages 236] illustrates this where it attempts to justify allowing the Applicant to defer its Proposed Remedial actions to clean up the contamination on the site until after the permit is issued for the project by the CEC. The PMPD [at page 236] represents the reason for Mr. Hill's participation during the evidentiary hearing [at footnote 44] as "to corroborate the Staff's and Applicant's proposed mitigation approach" while Intervener was misled by the Committee think it was in response to CARE's request for the attendance of SFBRWQCB Staff, Nancy Katyl. By deferring the SFBRWQCB Site Cleanup Plan until after the permit is issued for the project by the CEC the PMPD fails to provide Interveners and the public an opportunity to meaningful and informed participation in the projects mitigation for contamination present on the site. CARE does not concede that the MOU was exempt from the requirements of the Bagley-Keene Open Meeting Act, contending instead that this provides evidence of the conspiracy by the CEC in concert with the SFBRWQCB to violate the Open Meeting Act, CEQA, Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code" as well as the "equal protection" mandates of the Federal and State Constitutions.

During the evidentiary hearings, intervenors asked which entity has the ultimate authority in reviewing Applicant's proposal. In fact, the Conditions of Certification give each agency a meaningful and appropriate role. In the case of the Energy Commission, the CPM must approve the documents as meeting the Conditions of Certification. However, the Conditions of Certification give an enforcement role to both the Regional Board and the CEC. The joint enforcement is further memorialized and enforced by the formal MOU entered by the staffs of the two agencies on June 5, 2006.^[1]

¹ Memorandum of Understanding (MOU) Between the California Energy Commission staff and Staff of the San Francisco Bay Regional Water Quality Control Board, dated June 5, 2006, docketed June 8, 2006. The MOU is part of the administrative record in this case and supplements testimony in evidence. (5/31/06 RT 11-12,19.) CARE contends that the MOU between Staff and the Regional Board staff which covers site remediation measures, violates the Open Meetings Act. (CARE Brief, pp. 19-23.) However, agreements between agency staffs (as

At a May 31, 2006 evidentiary hearing Stephen Hill, head of the Toxics Cleanup Division for the Regional Board staff, testified that the health protective standards proposed by the Commission staff to address CEQA mitigation are appropriate, and that the Regional Board has agreed to implement them through the conditions of the Regional Board's SCP^[2]. (See 5/31/06 RT 13.) The proposed performance standards for the project's CEQA mitigation are similar to the kinds of conditions used by the Regional Board, which also typically employs performance standards. (Id.) Mr. Hill also stated that the MOU between the Regional Board staff and Commission Staff would provide for the Commission to have an advisory role when the Regional Board prescribes any future site remediation requirements.^[3] (5/31/06 RT 19-20.) In this consultative role the Commission staff will be able to assure the implementation of measures that will meet the performance standards that protect public health and worker safety. (Ibid.) [PMPD at page 236]

CARE contends that it is improper for the Applicant to defer its Proposed Remedial actions to clean up the site until after the permit is issued for the project by the CEC. To do so violates the city's own ordinances, and the California Environmental Quality Act (CEQA) which requires all feasible mitigation be adopted or that the project be denied for inducing significant unmitigated adverse impacts on the environment.

CEQA is primarily a public disclosure statutory scheme allowing the affected community to be informed and members of the public to voice their opinion, and to have input, about projects that may affect their environment. CEQA requires a review of the environmental impacts of overall activities ("the whole of an action" – 14 Cal. Code Regs. § 15378(a)) defined as "projects." (Pub. Res. Code § 21065.) This strong, broad right of public participation under CEQA has a political component (i.e., CEQA allows the compilation of a record concerning the approval of development projects that can be used by the public to vote environmentally insensitive decision makers out of office come

opposed to decision-making boards and commissions) are not subject to the Open Meetings Act, and the legal authority cited by CARE is not on point. It deals with closed sessions of a City Council, which is a deliberative decision-making body. In a letter dated June 22, 2006, the Executive Officer of the Regional Board staff also rejected CARE's Open Meetings Act argument

² Mr. Hill, appeared at the May 31 evidentiary hearing, at the Committee's request, to corroborate the Staff's and Applicant's proposed mitigation approach and to answer Committee questions. (5/31/06 RT 5-24.)

³ The staff-to-staff MOU, signed by the staff directors of both agencies, was docketed on June 6, 2006, and placed on the Commission's SFERP website.

election day), the violation or deprivation of which has constitutional ramifications on an affected community as well as the public at large.

Additionally, in deferring the mitigation plan until after the project is approved the CEC as the lead agency under CEQA is “piecemealing” the overall activity. CEQA strongly forbids this kind of “chopping up [of] a proposed project into bite-size pieces which, individually considered, might be found to have no significance on the environment.” (Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 716, citing Orinda Assn. v. Board of Supervisors (1986) 182 Cal.App.3d 1145, 1171, 1172; see also Bozung v. LAFCO (1975) 13 Cal.3d at 283-284; Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 309.)

CEQA provides that a proposed project may have a significant effect on the environment when the possible effects on the environment are individually limited but “cumulatively considerable.” (Pub. Res. Code § 21083(b); 13 Cal. Code Regs. § 15065. “‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (14 Cal. Code Regs. § 15065.) In addition to analyzing the direct impacts of a project, the CEQA Lead Agency must also consider a project’s potentially significant cumulative impacts.

Recent statutory law has invigorated CEQA’s role in ensuring “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies” (i.e., environmental justice).” (Emphasis added; see SB 115, Solis; Stats. 99, ch. 690, Gov. Code § 65040.12 and Pub. Res. Code §§ 72000-720001.) In conjunction with the regulatory provisions of the federal Clean Air Act and Division 26 of the Health and Safety Code,⁴ CEQA provides an ideal mechanism for ensuring that Environmental Justice will be addressed in all activities and projects that may have a significant effect on the environment.

CEQA requires that environmental documents (i.e., an environmental impact report (EIR) or equivalent) be prepared whenever a public agency proposes to undertake

⁴ This overlapping of statutory goals and requirements (see Pub. Res. Code § 21000(g), quoted above) is typical among statutory schemes aimed at protecting the public health.

a discretionary activity (which is defined extremely broadly as the “whole of an action” being engaged in) that may have a significant effect on the environment. (See Pub. Res. Code §§ 21002.1, 21061, 21064, and 21080.1; see also 14 Cal. Code Regs. § 15002.)

“Every citizen has a responsibility to contribute to the preservation and enhancement of the environment” and CARE’s members are attempting to carry out their duties to do so. (Pub. Res. Code § 21000(e).)

The recent enactment of Public Resources Code sections 71110 through 71115, and Government Code section 65040.12, in conjunction with other statutory and regulatory requirements, such as the Bay Area Air Quality Management District State Implementation Plan, and EPA regulations, require the CCSF, CEC, as well as other agencies, to infuse Environmental Justice into every aspect of decision-making. This panoply of statutory authority supplements the general authority to “do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon [a public agency]...” (Health & Saf. Code § 39600.) Further, the rules, regulations, and standards that the CCSF, CEC, and other agencies adopt must be “consistent with the state goal of providing a decent home and suitable living environment for every Californian” (Id. § 39601 (c).)

Therefore the proposed project, and all associated activities constituting the “whole of an action” being carried out by the public agencies involved capable of having an adverse environmental impact (14 Cal. Code Regs. § 15378(a); see also Pub. Res. Code § 21065), and therefore the proposed San Francisco Energy Reliability Project and the proposed remedial actions for the cleanup of contamination on the site considered together must be subjected to environmental review pursuant to CEQA to ensure that all the entire project’s adverse, potentially significant impacts on the Bayview Hunters Point community, as well as the entire region in which the project is located, are fully and fairly investigated, identified, analyzed, evaluated and, perhaps most importantly of all, mitigated – while also ensuring that project alternatives capable of avoiding or reducing the impacts are considered and, if feasible, adopted.

For example the PMPD explains [at page 227] Intervenors CARE argued that the approach agreed upon by Applicant and Staff violates the City’s ordinances and CEQA. (CARE Opening Brief at 24.) CARE urges that ‘...deferring mitigation until after the

project is approved...’ denies public input to the decision-making process and amounts to a ‘piecemeal’ analysis prohibited by CEQA (Id. at 25).” The PMPD failed to provide adequate citation of evidence that “piecemeal” analysis and deferred public participation in the SFBRWQCB approved Human Health Risk Assessment (HRA), Screening Level Ecological Risk Assessment (ERA), Site Cleanup Plan (SCP), Risk Management Plan (RMP), and Site Management Plan (SMP) for the containment or removal of contamination on the project site, by the CEC, is necessary to carry out its duties, under CEQA, Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code” as well as the “equal protection” mandates of the Federal and State Constitutions.

CARE no longer stipulates to Staff’s Testimony on Air Quality stipulating to Intervener Sarvey’s Testimony Instead

On the issue of Air Quality impacts from the project the PMPD [at page 101] states the “Applicant and Staff reached agreement on all relevant issues, including the Conditions of Certification following this narrative. (Exs. 46, 48.) Intervenor CARE also stipulated to the analysis of these matters contained in Staff’s testimony. (5/22/06 RT 304-305: 3-4.) Intervenor Sarvey, however, attempted to persuade the Committee that the analysis of record was flawed on a number of grounds, including an inadequate cumulative impacts analysis and ineffective mitigation measures. (Sarvey Opening Brief, pp. 2-7; Reply Brief, pp. 1-10, 25- 28; July 21, 2006 Reply Brief to Staff Late Filing, pp. 5-16.)”

While the PMPD is correct that on May 22, 2006 CARE stipulated to the analysis of these matters contained in Staff’s testimony, this was based on the mistaken understanding that Staff would seek the Applicant to offer up the \$800,000 for its purported community benefit program (PM2.5 mitigation) for a wood stove retrofit program. Instead the Staff has sided with the Applicant’s “proposal to address PM10 and PM2.5 emissions from operation, Applicant will provide 23.6 tpy of PM10 offsets. These will be realized from an enhanced street sweeping program designed to remove dust from the street, at about a 1.5:1 ratio when compared to project emissions, and thus reduce overall PM levels in the project vicinity. (5/22/06 RT 223-24; Ex. 48; Applicant Opening

Brief, p. 37.) In response to community concerns, Applicant will also institute an extensive tree planting program and an indoor program focusing on improving air quality in area residences, especially those of asthmatics. (5/21/06 RT 224.)” [PMPD at page 106]

Since Robert Sarvey is CARE’s expert consultant in this matter and he has advised us that 23.6 tpy will not “be realized from an enhanced street sweeping program designed to remove dust from the street” stating instead that “[a]ccording to the ARB document the net benefit of the Rule 1186 street sweeper is .05 pounds/mile. If the 9.6 miles of road is swept everyday that is total of 3,504 miles of road swept each year. When you multiply the ARB accepted benefit factor of .05 pounds/mile the applicants advanced street sweeping program will only eliminate 175.2 pounds per year of PM-10 which is less than 1 percent of the applicants claimed reduction of 24 tons per year.” [August 16, 2006 Sarvey Reply to applicant’s motion to have Portions of Intervenor Sarvey’s Brief treated as public comment at page 11.]

CARE wishes to clarify for the record that it no longer stipulates (in the absence of Staff’s \$800,000 wood stove program) to Staff’s testimony on Air Quality and Biological Resources, and incorporates Intervener Sarvey’s, testimony, pleadings, and other motions by this reference as if fully set forth by CARE.

Since Intervener Sarvey cites the CARB web site for his publicly available reduction rate of a “accepted benefit factor of .05 pounds/mile the applicants advanced street sweeping program” the PMPD [at page 107] is wrong in stating, “direct expert testimony contradicts the intervener’s assertions regarding the effectiveness of the street sweeping mitigation (5/22/06 RT 252) and the intervenor introduced no credible testimony to the contrary.”

The PMPD bases its false presumptions of the benefits on the Testimony of Applicant’s witness and Intervener Sarvey’s citation to the CARB reduction rate refutes Applicant’s witness where he states, “[t]he applicants witness Gary Rubenstein has a clear history of exaggerating the effectiveness of the mitigation programs he proposes. In the Los Esteros Project (03-AFC-02) Mr. Rubenstein claimed that the applicant’s (Calpine) wood stove program provided over 1900 tons of PM-10 reductions and the CEC Staff and the BAAQMD calculated the reductions as 6.8 tons per year less than 1%

of Mr. Rubenstein's claims." [August 16, 2006 Sarvey Reply to applicant's motion to have Portions of Intervenor Sarvey's Brief treated as public comment at page 10.]

CARE contends the PMPD provides evidence of the conspiracy by the CEC in concert with the CAISO to violate Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code" as well as the "equal protection" mandates of the Federal and State Constitutions

The PMPD [at pages 14 to 15] claims that based on the fact that "an AFC (such as the present one) that reaches final Commission decision after January 1, 2000, is not subject to a determination of need conformance" therefore "the closure of the Potrero units is largely irrelevant since, as discussed in appropriate portions of this Decision, all impacts of the SFERP are fully mitigated, with or without the continued generation at the Potrero site. How can the PMPD make such a claim knowing full well that the PMPD failed to provide adequate citation of evidence that "piecemeal" analysis and deferred public participation in the SFBRWQCB approved Human Health Risk Assessment (HRA), Screening Level Ecological Risk Assessment (ERA), Site Cleanup Plan (SCP), Risk Management Plan (RMP), and Site Management Plan (SMP) for the containment or removal of contamination on the project site, by the CEC, that is necessary for the CEC to comply with the requirements of CEQA, Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code" as well as the "equal protection" mandates of the Federal and State Constitutions.

The Applicant is a public agency and not a private corporation, and therefore must demonstrate the need for its project so as to prevent the waste of expenditure of the public's funds on impractical or illegal purposes, such as racial and economic discrimination. The CAISO by requiring that "generation must be located north of the Martin Substation in order to provide San Francisco with essential electrical reliability" when in fact additional transmission upgrades are now required to support the SFIA's FAA requirements for back-up power from the SFERP during an emergency, demonstrates the CEC, Applicant's, and CAISO's conspiracy to violate CARE's members' statutory, civil, and constitutional rights.

No party offered credible testimony sufficient to rebut the evidentiary showing summarized above. Intervenor CARE, however, contends that the

CAISO acted improperly and beyond its authority (“ultra vires”) in “approving” the SFERP without first consulting with all other agencies, specifically including the Regional Water Quality Control Board (Regional Board; Opening Brief, pp. 4-7). CARE apparently believes this contention gains credibility, at least in part, since neither Staff’s Opening Brief nor testimony on behalf of Applicant and Staff specifically refute the alleged impropriety by the CAISO. (CARE Reply Brief, pp. 7-8; Response to CEC Staff’s Reply Brief, pp. 1-2.)

CARE’s contentions are without merit and may be merely a misdirected attempt to bolster its position (discussed in the SOIL AND WATER RESOURCES section) that a final Regional Board analysis is required before we may certify the SFERP. As Applicant points out, the CAISO does not “approve” power plants, but rather administers matters related to interconnection with, and operation of, the grid. (Reply Brief, pp. 37-39.) We are the agency charged with performing the overall environmental review. As such, we have incorporated Conditions of Certification which specify the manner in which input from the Regional Board will be coordinated with the analysis of mitigation for such potential impacts as the Regional Board may identify. This is not within the scope of the CAISO’s responsibilities. Moreover, we will not address the jurisdictional question of whether we have authority to determine the propriety of an action by the CAISO, a nonprofit public benefit corporation, other than to observe that we are unaware of any statute conferring such jurisdiction.¹⁷

If as the PMPD claims the Commission has no “authority to determine the propriety of an action by the CAISO, a nonprofit public benefit corporation” then why then does the PMPD give such weight to the CAISO’s “Action Plan” while giving what amounts to no weight to CARE’s claims of discrimination against its members based on racial and economic discrimination. CARE is also, a nonprofit public benefit corporation, and therefore this too violates the “equal protection” mandates of the Federal and State Constitutions, to which we respectfully object.

CARE also objects to the presumption that only evidence and expert testimony presented during the evidentiary hearings has any weight in the Decision. As stated in the PMPD [at pages 4 to 5], “[a]t these hearings, all entities that have formally intervened as parties may present sworn testimony, which is subject to cross-examination by other parties and questioning by the Committee. Members of the public who have not intervened may present public comments. Evidence adduced during these hearings provides the basis for the Presiding Member’s Proposed Decision (PMPD).” Therefore

the Committee as well as the Commission in approving or denying the Final PMPD or Petition for Reconsideration has the discretionary authority to utilize anything that is part of the administrative under CEQA (Public Resources Code Section 21167.6, subdivision (e)). In the case of *Mejia v. City of Los Angeles* (130 Cal.App.4th 322) the court found “A lead agency cannot restrict the administrative record solely to those materials collected after earlier litigation on the project. The project application and other early material submitted prior to the earlier litigation is also part of the administrative record.” Therefore this ruling by the Court is interpreted by CARE to mean any information we provide the Commission, whether it be expert testimony, non-expert testimony, or even public comment, is ignored by the Commission at its own risk. This includes the Jefferson Martin transcript which the Applicant, Commission, and Staff have illegally sought to exclude from the record because they disagreed with its contents which refuted their testimony and rulings. CARE has brought six direct law suits against the Commission and four on behalf of individual CARE members in other siting Decisions up to now. The cause of actions in each suit included issues raised in both evidentiary hearings and also what the siting Committee in those cases identified as non-expert testimony or public comment. The Blythe I project suit that CARE won at the Appeals Court level for example was based on issues raised as non-expert testimony and public comments, so apparently the Court has different interpretation then the Commission on what constitutes an actionable record.

Respectfully submitted,



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Verification

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed on this 20th day of September 2006, at Soquel, California.



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