



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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In the Matter of Application of Southern
California Edison Company (U338E) for
Approval of Agreements to Sell Its Interests
in Four Corners Generation Station.

A. 10-11-010
(Filed November 15, 2010)

**REPLY OF SIERRA CLUB TO SOUTHERN CALIFORNIA EDISON COMPANY'S
RESPONSE TO SIERRA CLUB'S COMPENSATION CLAIM**

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I. Introduction

Sierra Club prevailed in elevating the critical environmental issues involved in Southern California Edison's ("SCE") proposed sale and associated capital investment in the Four Corners Power Plant ("Four Corners"). More specifically, Sierra Club successfully argued for, and actively participated in, the California Environmental Quality Act ("Act" or "CEQA") review of the sale. Sierra Club also participated in this case to ensure that the sale satisfied California's groundbreaking greenhouse gas reduction mandate. Sierra Club's involvement substantially contributed to this proceeding because it not only successfully secured environmental review of the sale, but also catalyzed a substantially improved Negative Declaration and a more thorough analysis of SB 1368 and the California Public Utilities Commission's ("Commission") Emissions Performance Standard ("EPS") than would have occurred otherwise.

SCE's response does nothing to refute this showing. Because it cannot dispute that compensation can be awarded to intervenors whose ultimate recommendations are not adopted by the Commission, SCE instead attempts to portray Sierra Club's arguments as "baseless" and attacks Sierra Club's motives in this proceeding. As detailed below, the Commission gave careful and extensive treatment to Sierra Club's arguments, which improved the administrative record on the environmental issues in this case.

SCE's attack on Sierra Club's motives also fails because Sierra Club intervened in this proceeding with a transparent and self-evident goal -- to mitigate the environmental harm caused by SCE's more than \$150 million investment in Four Corners that was associated with the sale. Four Corners is already one of the largest single sources of pollution in the country. As detailed in Sierra Club's CEQA comments, the potential greenhouse gas increases from SCE's investments are at least 90,000 tons per year, but could be as high as 6 million tons per year. The

environmental justice concerns from any associated increase in toxic pollution are also significant because of the disproportionate impact on the people of the Navajo Nation. These significant environmental impacts warranted careful consideration under CEQA, and while the Sierra Club was ultimately unsuccessful in obtaining a full environmental impact report (“EIR”), its efforts in this proceeding elicited consideration of these impacts in a CEQA process that otherwise would not have gone forward at all.

Recognizing the high stakes to climate change and human health associated with the sale, Sierra Club invested significant resources into this proceeding. The results of this investment — CEQA review, a greatly improved Negative Declaration and a detailed analysis of the Commission’s EPS arguments in the Final Decision — warrant an award of intervenor compensation.

II. Legal Standard

The standard for an award of intervenor compensation is whether the intervenor made a substantial contribution to the Commission’s decision, not whether the intervenor prevailed on a particular issue. For example, in D.08-04-004, the Commission found that “[s]hould the Commission not adopt any of the customer’s recommendations, compensation may be awarded if, in the judgment of the commission, the customer’s participation substantially contributed to the decision or order.” (D.08-04-004 [in the review of SCE’s contract with Long Beach Generation, A.06-11-007] at 5.) Despite rejecting The Utility Reform Network’s (“TURN”) recommendations, the Commission awarded TURN intervenor compensation for all reasonable hours devoted to that proceeding, reasoning that:

The opposition presented by TURN and other intervenors gave us important information regarding all issues that needed to be considered in deciding whether to approve SCE’s application. As a result, we were able to fully consider the consequences of adopting or rejecting the LBG PPA. Our ability to thoroughly

analyze and consider all aspects of the proposed PPA would not have been possible without TURN's participation.

(*Id.* at 6.) Similarly, the Commission awarded compensation to the Center for Biological Diversity ("CBD") in D.11-010-041, despite having denied CBD's motion to reconsider and revise the scoping order and leave to file testimony on CEQA issues. The Commission found that "although it is difficult to assign a dollar value to [CBD's] participation in this proceeding, its participation assisted the Commission in developing a complete record" on the CEQA issues related to the case. (*Id.* at 5.) Further, in D.09-04-027, the Commission awarded TURN compensation on issues where they did not prevail in the SCE AMI proceeding (A.07-07-026). The Commission reasoned that TURN had made a substantial contribution even on issues where TURN did not prevail because its efforts "contributed to the inclusion of these issues in the Commission's deliberation" and caused the Commission to "add more discussion on the issue, in part to address TURN's comments." (D.09-04-027 at 4.)

SCE's response ignores the Commission decisions cited above. Despite the extensive discussion of the legal standard established by these decisions in the Intervenor Compensation Claim of Sierra Club dated May 29, 2012 ("Compensation Request"), SCE fails to mention or to even attempt to distinguish them from the present case. (Compare Compensation Request, Sec. 9 with SCE Response at 3-5.) Instead, SCE argues that there cannot be a substantial contribution when the Commission does not ultimately side with the intervenor. (See SCE Response at 3-5.) This interpretation is unduly narrow, especially given the facts of this case.

III. Sierra Club Made a Substantial Contribution to this Proceeding.

A. Securing CEQA Review

As Sierra Club explained in its compensation request, Sierra Club prevailed in securing CEQA review of the sale. (Compensation Request, Sec. 9.) SCE does not dispute that the

Commission’s CEQA review of the sale was the direct result of Sierra Club’s participation. (See Sierra Club’s Motion to Intervene at 4-6; Scoping Ruling at 2-6; SCE Response at 4.) Sierra Club’s CEQA applicability arguments thus constituted a substantial contribution because they “gave [the Commission] important information regarding all issues that needed to be considered in deciding whether to approve SCE’s application” (D.08-04-004 at 6) and further “contributed to the inclusion of these issues in the Commission’s deliberation.” (D.09-04-027 at 4.) SCE offers nothing to refute this showing in its response and even acknowledges that “the Commission ultimately agreed with” Sierra Club on this issue. (SCE Response at 4.)

B. Sierra Club’s Active Participation in the CEQA Process

After successfully arguing for CEQA review, Sierra Club actively participated in the CEQA process it secured in this proceeding. As detailed in its compensation request, Sierra Club substantially contributed to the CEQA review phase of this proceeding through extensive comments and an expert report detailing Sierra Club’s concerns regarding the Negative Declaration’s project description, its substantive environmental analysis, its failure to include quantitative significance thresholds, its conclusion of no significant environmental impact, and its failure to consider cumulative impacts. These arguments substantially contributed to the proceeding because they “contributed to the inclusion of these issues in the Commission’s deliberation” (D.09-04-027 at 4), “add[ed] more discussion on the issue” (*Id.* at 4), and helped “develop a complete factual record.” (D.11-010-041 at 5-6; D.12-03-034 at 2, 5-7, 25-28.) Moreover, by improving the Negative Declaration’s environmental analysis, Sierra Club’s participation was “productive and will likely result[] in future benefits to ratepayers....” (D.11-010-041 at 6.) This contribution is evidenced by the significant modifications made to the Negative Declaration that would not have occurred otherwise, including major revisions to the

project description and emissions analyses, and the introduction of quantitative significance thresholds in response to Sierra Club's comments. (See Draft Initial Study and Negative Declaration dated September 2011; Sierra Club's Comments on Draft Initial Study and Negative Declaration dated November 3, 2011; Dr. Petra Pless's Comments on the Draft Initial Study and Negative Declaration dated November 2011; Commission Staff's Response to Comments and Final Initial Study and Negative Declaration, marked as Exhibits 19 and 26 to the evidentiary record.) The Final Decision similarly devoted detailed treatment to Sierra Club's arguments. (See D.12-03-034 at 2, 5-7, 25-28.)

SCE's response offers no reason why this CEQA-related contribution was not substantial. Instead, SCE argues that the Commission did not ultimately side with Sierra Club and require a full EIR or prohibit SCE's post-2011 investment in Four Corners. Yet, as explained above, under the relevant standard for intervenor compensation, intervenors need not ultimately prevail on a particular issue to be eligible for compensation.

Because it cannot refute that Sierra Club's CEQA efforts resulted in a more robust record and a significantly improved Negative Declaration, SCE resorts to a *post hoc* repetition of its specific critiques of Sierra Club's comments. SCE first attempts to portray the "potential to emit" standard of 8750 hours per year used by Sierra Club as "utterly unsupported by any facts, law or logic" (SCE Response at 5), despite the fact that 8750 hours per year is the standard "potential to emit" scenario under the Clean Air Act and therefore under CEQA review. (40 CFR 52.21(b)(4).) In fact, as explained in Sierra Club's comments and briefing on this issue, this operating scenario was included in the original Negative Declaration and was based on the facility's *own* federal Clean Air Act operating permit. (Opening Brief of Sierra Club on CEQA Issues dated Feb. 6, 2012 at 14.)

SCE next makes the unsupported allegation that Sierra Club proffered differing reliability predictions for the Four Corners plant to the CPUC and the Arizona Corporation Commission. (See SCE Response at 5.) This is a severe distortion of Sierra Club's arguments in the respective proceedings. The issue in the Arizona proceeding was whether reliability would remain steady or decrease over the next twenty years and beyond. In that proceeding, Sierra Club argued that given the advanced age of the plant, its reliability is likely to decline over the next two decades and beyond. By contrast, in this case, Sierra Club argued that because the plant has already reached the end of its useful life, SCE and its co-owners have had to invest hundreds of millions of dollars in the plant and increase its capacity (and potential pollution) in order to ensure that the plant retains some residual value. SCE's recent extensive investments are evidence of the fact that the plant has reached the end of its useful life and should be transitioned to cleaner forms of power generation. These arguments are therefore entirely consistent.

SCE's accusations of intentional delay are similarly unfounded and nonsensical. Sierra Club's interest in this case was to ensure that SCE's investments complied with California's environmental laws. Sierra Club had no interest in delaying the sale; in fact, it chose to forego an appeal of the Commission's decision to allow the sale to proceed within the timeframe contemplated by the sale agreement. SCE provides no basis or explanation for its claim that Sierra Club was intent on delaying the sale, let alone any explanation of what Sierra Club could possibly gain from such delay. This accusation is particularly objectionable given that any delay associated with environmental review was due, at least in part, to SCE's own failure to respond to the Commission's request for CEQA-related information in a timely manner. (See Reporter's Transcript of May 23, 2011 Evidentiary Hearing, at 72: lines 27-28 and at 73: lines 1-3 [Judge Yacknin noting that some information "took a long time to receive from Edison"].) In short, the

fact that it took nearly one year for the relatively short Negative Declaration to issue had nothing to do with the Sierra Club. (See *id.*)

Once the Negative Declaration was issued, the Sierra Club submitted extensive, detailed comments that resulted in significant improvements to the document. SCE's suggestion that Sierra Club's detailed and lengthy comments and briefing on this issue was some sort of pretense to achieve something other than an environmental mitigation lacks any foundation or reason. Indeed, Sierra Club's active participation in the CEQA process, and the resulting improvements to the CEQA document, represent precisely how CEQA's public comment process was designed to work. SCE may consider this public notice and comment process to be wasteful, but the Legislature long ago decided otherwise when it enacted CEQA.

C. SB 1368 and Commission's Emissions Performance Standard

Sierra Club also substantially contributed to the first phase of this proceeding through extensive arguments related to the sale's compliance with the Commission's EPS. Specifically, Sierra Club argued that the plain language of the EPS bars any post-2011 investment in the power plant and that a number of the investments proposed by SCE were life-extending and/or capacity-increasing. Sierra Club further argued that SCE had failed to meet its burden of proof to demonstrate otherwise.

These arguments substantially contributed to the proceeding because they "contributed to the inclusion of these issues in the Commission's deliberation" (see D.09-04-027 at 4) and "add[ed] more discussion on the issue, in part to address [...] comments" by Sierra Club. (See *id.*) In fact, tSierra Club's arguments carried enough weight to merit an acknowledgement of the plain language restriction in the Four Corners-specific EPS and an explanation for the Commission's decision to deviate from this restriction in the final decision. (See D.12-03-034 at

14-15.) As the Commission explained, “we find it prudent to deviate from D.10-10-016’s restrictions on SCE’s expenditures for Four Corners for 2012 and to exempt the [...] 2012 capital expenditures from the EPS rules adopted in D.07-10-039.” (See *id.*) Without Sierra Club’s extensive arguments on these issues, it is unlikely that the final decision would have contained as thorough a discussion or have expressly extended the Four Corners EPS exemption to accommodate SCE’s request to make additional, post-2011 expenditures.

SCE offers nothing to refute this substantial contribution and further fails to even discuss the treatment the Commission gave to Sierra Club’s arguments. Instead, SCE attempts to portray Sierra Club’s arguments as lacking “simple common sense” and having “little or nothing to do with the issues” of this proceeding — assertions rendered baseless by the weight the Commission gave the Sierra Club’s arguments in D.12-03-034. (SCE Response at 3-4; D.12-03-034 at 14-15.) SCE’s EPS-related arguments are nothing more than an attempt to re-argue the merits of this case, which is entirely inappropriate at the post-decisional compensation stage of a proceeding. (See SCE Response at 3-4, fns. 8, 9, 11, 13.)

In addition, SCE’s reliance on *In re American Tel. & Tel. Co.* (1994) 57 Cal.P.U.C.2d 347 is inapposite. In that case, an intervenor was unable to demonstrate its substantial contribution because it only minimally participated in the proceeding and because it attempted to take credit for contributions it did not make. (*In re American Tel. & Tel. Co.* (1994) 57 Cal.P.U.C.2d 347, 351-52.) Here, D.12-03-034 makes clear that Sierra Club was an active party addressing substantive issues throughout the proceeding. As SCE itself highlights, Sierra Club “persistently” made EPS arguments. (See SCE Response at 2.) Nowhere has Sierra Club attempted to take credit for contributions that were not its own; SCE does not and cannot show otherwise.

D. Discovery

While Sierra Club is not seeking compensation for any time it spent on discovery, the Sierra Club substantially contributed to the proceeding by successfully compelling SCE to produce information relating to the existing condition of Units 4 and 5 of the Four Corners power plant. (Compensation Request, Sec. 9.) At the close of the nearly two-hour discovery hearing, Judge Yacknin adopted the majority of Sierra Club's recommendations and directed SCE to produce much of the contested materials. (Reporter's Transcript of April 25, 2011 Discovery Conference at 64: lines 6-8 and at 67: lines 4-5.)

Despite its largely unsuccessful attempt to challenge Sierra Club's discovery requests, SCE accuses the Sierra Club of abusing the discovery process in this proceeding solely to support the Sierra Club's separate Clean Air Act New Source Review lawsuit against it. (See Response, at 3; *Diné Citizens Against Ruining Our Environment et al, v. Arizona Public Service Company et al* (D.N.M., Oct. 4, 2011, No. 1:11-cv-00889-BB-KBM.) Judge Yacknin's discovery ruling in Sierra Club's favor plainly shows otherwise. Modifications that violate the EPS also raise Clean Air Act concerns and vice versa. SCE's attempt to attribute malicious intent to the Sierra Club's discovery efforts lacks a rational basis and further fails to defeat Sierra Club's showing of substantial contribution.

Moreover, SCE's attempt to cast aspersions on Sierra Club for its discovery efforts directly contradicts the company's arguments in the parallel Clean Air Act case. In that federal court case, SCE is denying any post-2010 modifications to Four Corners. (See Exhibit 1, Dkt. No. 52 at 20, *Diné Citizens Against Ruining Our Environment et al, v. Arizona Public Service Company et al* (D.N.M., Oct. 4, 2011, No. 1:11-cv-00889-BB-KBM.)) There, SCE also attempts to justify its failure to notify the U.S. EPA of physical modifications of Four Corners by arguing

that PUC approval obviates the need to separately notify the federal government. (*Id.* at 14 [“Several defendants are public utility companies that must obtain regulatory approval to recover through rates the cost of most capital projects.”].) In other words, here, SCE is arguing that the Sierra Club should not be allowed to use information gained in the PUC for its Clean Air Act enforcement. Yet, in federal court, SCE is arguing that the information it submits to the PUC is directly relevant to those same environmental enforcement efforts. SCE cannot have it both ways; SCE’s attack on Sierra Club’s discovery requests thus falls flat.

IV. Sierra Club’s Requested Compensation Is Reasonable.

As detailed in its compensation request, Sierra Club’s time is reasonable. Out of an abundance of caution, Sierra Club is voluntarily omitting the time it spent on discovery in its request.¹ Sierra Club further exercised billing judgment by reducing its time by 20% across the board. SCE offers no specific objection to Sierra Club’s time and instead resorts to sweeping, unsubstantiated complaints about Sierra Club’s work being “inefficient, ineffective, and unnecessary.” (See SCE Response at 6.)

Moreover, SCE’s attempt to compare the reasonableness of TURN’s and Sierra Club’s request claims is a disingenuous “apples to oranges” comparison. While both Sierra Club and TURN actively participated in the first phase of the proceeding, TURN did not participate in the second phase, which was exclusively devoted to CEQA. As SCE is undoubtedly aware, and as evidenced by Sierra Club’s extensive briefing and comments, CEQA law is complex and thus demands a separate type of expertise. Unsurprisingly, Sierra Club spent the largest part of its time on the CEQA process in this proceeding.

¹ SCE makes the novel argument that “discovery” encompasses any and all *use* of evidence gained through discovery. (See SCE Response, fn. 14.) This argument is not consistent with the Commission’s definition of discovery, and therefore does nothing to detract from the reasonableness of Sierra Club’s voluntary reduction. (See Commission’s Rule of Practice and Procedure 10.1).

V. Conclusion

SCE has failed to refute Sierra Club's thorough showing of substantial contribution to this proceeding and the reasonableness of its request. Sierra Club therefore respectfully urges the Commission to grant Sierra Club's Intervenor Compensation Claim in full.

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Respectfully Submitted,

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