

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



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Application of Southern California Edison
Company (U338E) for Approval of the
Results of Its 2013 Local Capacity
Requirements Request for Offers for the
Moorpark Sub-Area.

Application 14-11-016
(Filed November 26, 2014)

**MOTION OF NRG ENERGY CENTER OXNARD LLC TO STRIKE
TESTIMONY ON TOPICS OUTSIDE THE SCOPE OF THE PROCEEDING**

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), NRG Energy Center Oxnard LLC (“NECO”) submits this motion to strike testimony served by the City of Oxnard and the California Environmental Justice Alliance (“CEJA”) addressing topics related to the Puente Power Project (“P3”) that are outside the scope of this proceeding. In particular, NRG moves to strike the following testimony:

- Testimony of Dr. David Revell on Behalf of the City of Oxnard (“Revell Testimony”);
- Testimony of David Cannon on Behalf of the City of Oxnard (“Cannon Testimony”); and
- Prepared Testimony of Amy Vanderwarker on Behalf of the California Environmental Justice Alliance Regarding Oxnard as a State-Identified Overburdened Area (“Vanderwarker Testimony”).

The Revell Testimony, the Cannon Testimony, and the Vanderwarker Testimony (referred to herein collectively as the “Siting Testimony”) each focuses solely on opposing the location of P3, a new electricity generating facility that will provide resource adequacy capacity under one of the contracts executed by Southern California Edison Company (“SCE”) and

submitted for review in this proceeding. P3 is a 262 megawatt (“MW”) natural gas-fired thermal power plant that will be sited on approximately three acres of the existing 36 acre Mandalay Generating Station property in Oxnard, California.

The claims in the Siting Testimony regarding P3’s site are outside the scope of the Commission’s review of SCE’s request for offers (“RFO”) process and the resulting contracts executed by SCE. The action requested of the Commission with respect to P3 is authorization for SCE to meet a portion of its local capacity requirements (“LCR”) need through the P3 resource adequacy contract, with corresponding approval of SCE’s requested cost recovery and cost allocation treatment for the contract. This proceeding does not involve the granting of any approval to locate and construct P3 at the proposed site in Oxnard. Such approval cannot occur in this proceeding, as the Commission lacks authority to approve or deny approval for construction of P3. Because the Siting Testimony focuses solely on opposing the location of P3, the entirety of the Siting Testimony is not relevant evidence in this proceeding.

As a thermal power plant in excess of 50 MW, P3 is subject to the exclusive licensing authority of the California Energy Commission (“CEC”). NECO filed its Application for Certification of P3 (“AFC”) with the CEC on April 15, 2015. The CEC possesses exclusive authority under state law to render a determination regarding whether to site and build P3 at the location proposed in the AFC. If the Commission were to make a determination on the suitability of the P3 site, that determination would be superseded by the CEC’s determination regarding the site when it issues its decision on the AFC. Thus, consideration of the Siting Testimony in this proceeding would merely prejudge the outcome of the CEC’s review of the AFC. This would be well beyond the scope of the Commission’s authority to review RFO results and the reasonableness of the selected contracts. Also, if the Commission were to start

rejecting contracts based on facts that are within the CEC's exclusive authority to weigh and assess, then the Commission would be substituting its judgment for that of the CEC, and eliminating projects before the CEC has the chance to complete its legislatively authorized review. Such a determination would encroach on the CEC's exclusive authority under state law and eliminate viable projects.

For these reasons, which are explained further in Section II below, the Siting Testimony should not be considered or included in the record in this proceeding.

On April 8, 2014, NECO served the Prepared Testimony of Phillip Mineart, P.E. on Behalf of NRG Energy Center Oxnard LLC ("Mineart Testimony"). The Mineart Testimony provides an excerpt from the AFC that is titled "Appendix N-2 Technical Memorandum Sea Level Rise Analysis Prepared in Support of Application for Certification, Puente Power Project." The message accompanying electronic mail service of the Mineart Testimony advised parties as follows:

The attached testimony is served in anticipation of testimony being served in this proceeding by other parties addressing potential impacts from sea level rise and other environmental claims that are outside the proper scope of this proceeding. NECO intends to move to strike any such testimony and to offer to withdraw Mr. Mineart's testimony at such time as NECO's motion is granted.

Consistent with the foregoing message, if this motion is granted and the Siting Testimony is stricken, NECO will withdraw the Mineart Testimony and will not seek to have the Mineart Testimony admitted into the record in this proceeding.

II. DISCUSSION

A. The Siting Testimony is not relevant evidence in this proceeding.

To admit the Siting Testimony as evidence, the proponents of the Siting Testimony must demonstrate that it is relevant to this proceeding.¹ Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”²

The Assigned Commissioner’s Ruling and Scoping Memo issued March 13, 2015 (“Scoping Memo”) established that the purpose of this proceeding is to review the results of SCE’s 2013 LCR RFO in the Moorpark sub-area of Big Creek/Ventura local reliability area to meet long-term capacity requirements by 2021.³ The issues to be determined focus on the RFO solicitation and evaluation process, the reasonableness of the contracts selected and executed by SCE through the RFO process, and SCE’s proposed cost recovery and cost allocation treatment for the executed contracts.⁴ The Scoping Memo recognizes that the CEC is the state agency with jurisdiction to review environmental issues associated with P3, and that “environmental matters will largely be resolved by the CEC.”⁵

Through the Siting Testimony, the City of Oxnard and CEJA attempt to inject an additional purpose into this proceeding by asking the Commission to evaluate the suitability of locating one of the projects selected through the RFO at a coastal site in Oxnard, California. The Revell Testimony presents a technical environmental report titled “Vulnerabilities of the Proposed Mandalay Generating Station to Existing and Future Coastal Hazards and Sea Level

¹ California Evidence Code § 350.

² *Id.* § 210.

³ Scoping Memo at 1.

⁴ *Id.* at 4-5.

⁵ *Id.* at 5.

Rise.”⁶ The stated purpose of this technical report is to “assess . . . the vulnerability of [P3] to existing and future coastal hazards and climate change impacts.”⁷ The Revell Testimony asks the Commission to “consider potential coastal hazards that could result from siting critical power infrastructure along the Oxnard coast.”⁸

The Cannon Testimony presents a second technical environmental report titled “Sea Level Rise Vulnerability Assessment: Tsunami Analysis Mandalay Bay Generating Station.”⁹ The stated purpose of this second technical report is to “assess . . . potential inundation of the [P3] site from future tsunami events that could impact the California coast near the City of Oxnard.”¹⁰ The Cannon Testimony “also discusses the importance of continuing existing levels of sediment supply for reducing potential tsunami and other coastal hazards, and the uncertainties regarding future sediment supply for the Oxnard coast.”¹¹

The purpose of the Vanderwarker Testimony is to show that the City of Oxnard, where P3 will be located, is “a vulnerable, environmentally burdened community.”¹² The Vanderwarker Testimony thus asks the Commission to consider potential environmental impacts from locating P3 at the site of the existing Mandalay Generating Station in Oxnard, California.

The claims in the Siting Testimony regarding P3’s site are outside the scope of the Commission’s review of the RFO process and the resulting contracts executed by SCE. The “action” requested of the Commission with respect to P3 is authorization for SCE to meet a

⁶ Revell Testimony, Exhibit CO-4. The Revell Testimony incorrectly refers to P3 as the “Proposed Mandalay Generating Station.”

⁷ Revell Testimony at p. 1, lines 15-17.

⁸ *Id.* at p. 1, lines 20-22.

⁹ Cannon Testimony, Exhibit CO-2.

¹⁰ *Id.* at p. 1, lines 17-19.

¹¹ *Id.* at p. 1, lines 19-21.

¹² Vanderwarker Testimony at p. 7, line 9.

portion of its LCR need through the P3 resource adequacy contract, with corresponding approval of SCE's requested cost recovery and cost allocation treatment for the contract. This proceeding does not involve the granting of any approval to locate and construct P3 at the site proposed in the AFC. Indeed, such approval cannot occur through this proceeding. The Commission does not have authority to approve, deny, or condition construction of a power plant by a non-utility independent power producer such as NECO. That authority lies exclusively with the CEC, as discussed in Section B below. Because the Commission cannot approve or deny approval for the P3 site, testimony regarding the suitability of the P3 site cannot prove or disprove any disputed fact that is of consequence to the action that is within the Commission's authority in this proceeding. The Siting Testimony thus is not relevant evidence in this proceeding and is not admissible. Striking the Siting Testimony is also consistent with long-standing precedent holding that the Commission will not conduct an environmental review of proposed projects when reviewing and authorizing rate recovery for utility power purchase agreements.¹³

B. Consideration of the Siting Testimony would encroach on the CEC's exclusive jurisdiction to approve the P3 site and authorize construction of P3.

Under Section 25500 of the California Public Resources Code, enacted in the Warren Alquist Act ("Section 25500"), the CEC has "the exclusive power to certify all sites and related

¹³ See e.g., Decision 86-10-044, 1986 Cal PUC LEXIS 642, 22 CPUC2d 114 (October 16, 1986); Resolution E 4686 (confirming that review of "the CA Flats PPA is not a 'project' pursuant to CEQA"); Resolution E-4522 ("The Commission reiterates that while it acknowledges that environmental issues with Rio Mesa 2 have the potential to pose significant risks, the Commission will not pre-judge the projects in light of these issues. The Commission also notes that environmental permitting for the PPAs is the jurisdiction of the California Energy Commission."); Resolution E-4467 ("Commission review of a PPA is not review of a 'project,' but a review of the costs SDG&E's ratepayers will incur pursuant to the proposed PPA. Further, any project, as defined by CEQA, is subject to all applicable environmental laws."); Resolution E-4439 ("As previously noted by this Commission, the Commission's review of PPAs is confined to approval of costs pursuant to a PPA. Further, Commission approval of the PPA does not exempt the project from compliance with all applicable environmental laws nor does it limit the review of project alternatives should future environmental reviews of the development projects require such analysis.").

facilities in the state, whether a new site and related facility or a change or addition to an existing facility.” P3 is a thermal power plant with a capacity in excess of 50 megawatts, and thus constitutes a “site and related facilities” as defined in Section 25500. Section 25500 specifies that “no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the [CEC], as prescribed in this division.” This shows that NECO cannot commence construction of P3 without first obtaining certification from the CEC.

Section 25500 also specifies that the “issuance of a certificate by the [CEC] shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.” The CEC thus has exclusive authority to render a determination regarding the claims presented in the Siting Testimony and to decide whether to approve construction of P3 at the site proposed in the AFC.

The concerns presented in the Revell Testimony and the Cannon Testimony regarding coastal hazards, sea level rise, and tsunamis are squarely within the scope of the CEC’s review. The CEC’s regulations specify that “[t]he purpose of an application proceeding is to ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level consistent with the need for such energy, and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality.”¹⁴ The CEC’s regulations further specify that “[i]nformation on safety and reliability of the proposed facility,

¹⁴ Title 20 California Code of Regulations, Section 1741(a).

describing in detail the measures proposed to ensure the safe and reliable operation of the facility shall be provided in the application as specified in the appropriate appendix.”¹⁵ The CEC’s information requirements for an AFC require the AFC to include “[a] discussion of the anticipated service life and degree of reliability expected to be achieved by the proposed facilities based on a consideration of” numerous factors, including “[g]eologic and flood hazards, meteorologic conditions and climatic extremes, and cooling water availability.”¹⁶ To address this, the technical report attached to the Mineart Testimony, which addresses the same topics as the Revell Testimony and the Cannon Testimony, has already been submitted to the CEC as part of the AFC. In certifying other projects located on coastal sites, the CEC has evaluated resistance to potential natural hazards such as earthquakes, flooding, tsunami, and sea level rise.¹⁷ The CEC thus has exclusive authority to render a determination regarding the viability of the P3 site in light of potential coastal hazards, sea level rise, and tsunamis.

The AFC process also encompasses review of potential environmental justice concerns such as those raised in the Vanderwarker Testimony. The CEC’s website explains that “[t]he Energy Commission has been integrating environmental justice into its siting process since 1995, as part of its thorough California Environmental Quality Act (CEQA) analysis of applications for siting power plants and related facilities.”¹⁸ NECO has provided an analysis of air quality impacts in Section 4.1 of the AFC, and an environmental justice analysis in Section 4.10 of the AFC. The CEC thus has exclusive authority to render a determination regarding the claims presented in the Vanderwarker Testimony.

¹⁵ *Id.* Section 1743(a).

¹⁶ *Id.* Chapter 5, Appendix B(h)(3)(B).

¹⁷ Final Decision on the Huntington Beach Energy Project, November, 2014, CEC-800-2014-001-CMF at 5.2-13 through 5.2-16 and 5.4-14 through 5.4-15.

¹⁸ See http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html.

As demonstrated by Section 25500, if the Commission were to render a determination regarding the suitability of the P3 site – whether based on perceived risks from coastal hazards, sea level rise, and tsunamis, or based on concerns about potential environmental impacts – that determination would be superseded by the CEC’s determination on the same topics when it issues its decision on the AFC. Any consideration of the concerns in the Siting Testimony would merely prejudge the outcome of the CEC’s review of the AFC. This would be well beyond the scope of the Commission’s authority to review RFO results and the reasonableness of the selected contracts. Also, if the Commission were to start rejecting executed contracts based on facts that are within the CEC’s exclusive authority to weigh and assess, then the Commission would be substituting its judgment for that of the CEC, and eliminating projects before the CEC has the chance to complete its legislatively authorized review. Such a determination would encroach on the CEC’s exclusive authority under Section 255000 and eliminate viable projects.

III. CONCLUSION

For the reasons described above, the Siting Testimony should be stricken and not admitted as evidence in this proceeding. As stated above, if this motion is granted and the Siting Testimony is stricken from the proceeding, NECO will withdraw the Mineart Testimony and will not seek to have it admitted into the record.

Dated: May 1, 2015

Respectfully submitted

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