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5-23-16  
04:59 PM

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

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)

**REPLY BRIEF BY CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE  
IN SUPPORT OF MOTION TO SET ASIDE SUBMISSION  
AND REOPEN RECORD TO TAKE ADDITIONAL EVIDENCE**

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Dated: May 23, 2016

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The California Environmental Justice Alliance (“CEJA”) respectfully submits this reply brief in support of its Motion to Set Aside Submission and Reopen the Record (“Motion”) to take additional evidence of a fact material to the Commission’s evaluation of the 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”). CEJA submits this Reply brief in support of the Motion pursuant to Commission Rule 13.14, by permission of ALJ DeAngelis dated May 18, 2016.

**I. This Motion is Not the Proper Vehicle to Weigh New Evidence, but Existence of Additional Evidence Warrants Reopening the Record.**

NRG and SCE concede that the new evidence proffered by CEJA is relevant to a highly material fact in this proceeding. The Commission follows the rule that “[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.”<sup>1</sup> CEJA’s Motion meets this standard. Likewise, there is no contention that CEJA could or should have presented it to the Commission prior to closing the evidentiary record. Instead, NRG opposes CEJA’s motion by seeking both to retract and to re-characterize its February 2016 letter. CAISO offers unsupported statements interpreting the new evidence, and SCE and NRG both suggest additional facts (some new, some pre-existing) that may, if admitted, also inform the analysis mandated by Track 1. In sum, nothing in those responses defeats CEJA’s Motion to reopen the record.

NRG objects to CEJA’s motion on the ground that “[t]his proceeding is at a very advanced stage.”<sup>2</sup> NRG is the only entity in control of its compliance plans and evidence

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<sup>1</sup> *Re Pac. Gas & Elec. Co.* (Dec. 22, 1986) 23 CPUC 2d 352.

<sup>2</sup> NRG Response, p. 1.

thereof, and it could have, and should have, corrected any factual misrepresentations or inaccuracies early on. Indeed at any point in the 2012 LTPP proceeding, or in this application, NRG could have observed that the oft-repeated assumption that the Ormond Beach Generating station (“OBGS”) and Mandalay’s Once Through Cooling (“OTC”) units would retire was not, technically, correct, because NRG did not have any retirement plan for OBGS. That NRG never offered the information is neither the fault of the Commission nor of the parties. NRG cannot complain about the timeliness or posture of this proceeding, because the delay is of its own making.

The new evidence raised by CEJA shows that OBGS may continue operations past 2020, and that it is not a foregone conclusion that it will retire, a prospect that significantly alters a factual premise of this Proceeding. When the Commission issued the Track 1 decision requiring SCE to procure a minimum of 215 MW to replace the four OTC units in the Moorpark subarea, the Commission concluded that the evidence showed that none of the units would remain online past 2020.<sup>3</sup> In February 2016, NRG submitted a letter to the State Water Resources Control Board (“SWRCB”) asserting it instead has *no intention* of retiring OBGS, *no retirement plan* for OBGS, and rather, to the contrary, was pursuing a two year Track 2 compliance study to keep the OBGS units online.

NRG’s May 6, 2016 letter and other very recent efforts to retract those statements cannot cure the significant factual dispute raised by CEJA. First, as discussed below, NRG’s internally inconsistent statements go to the crux of this proceeding, and NRG cannot itself determine how to resolve the dispute. Second, NRG’s newly manufactured evidence does not conclusively establish that it will retire the OBGS units, and the question therefore remains. In February 2016, NRG sent a letter to the SWRCB regarding the Mandalay OTC units explaining that the proposed Puente plant is intended to replace Mandalay’s OTC units, which are on track to retire by 2020. No such assurances exist for the OBGS. Even in its new May 6 and 19 letters regarding OBGS, NRG nowhere represents that OBGS is also being replaced by Puente. Neither

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<sup>3</sup> D.13-02-015, p. 68.

does it show actual retirement plans for OBGS. The issue raised by CEJA’s Motion remains. Despite assurances in Track 1 that OBGS would retire, the new evidence now shows the real possibility that the Oxnard community may end up burdened by a new Puente power plant, the existing Mandalay peakers, *and* one or more OBGS power plants.

**A. The Track 1 Decision Specifically Instructed that New Evidence Regarding OTC Retirements be Considered in a Procurement Application Proceeding.**

NRG concedes that the Track 1 decision relied on retirement of *all* four NRG OTC units in Oxnard. The Commission observed in February 2013 that, “there is at this time insufficient evidence that any change to the OTC deadlines in Table 1 will occur.”<sup>4</sup> In the event some of the OTC units were instead to be kept online past their retirement dates, the new fact was to “be taken into account in future procurement proceedings or in review of a procurement application by SCE.”<sup>5</sup> Evidence suggesting a change to the retirement of the two largest OTC units in the Moorpark sub-area significantly alters a factual issue at the heart of this proceeding must be included in the record. Any factual dispute about the import of that evidence should be determined after the parties are allowed to conduct discovery on the issue.

**B. NRG’s Attempted Repudiation of its February 2016 Letter Cannot Defeat CEJA’s Motion Based on the Existence of New Evidence Going to a Highly Material Factual Issue.**

NRG’s Response attempts to re-characterize its February 2016 letter, contending that “[t]he assumption that Ormond Beach would retire at the end of 2020 has not changed[.]”<sup>6</sup> Having been caught in this proceeding with the premise that it *would* retire OBGS on the one hand, and representing to the SWRCB that it will *not* retire OBGS on the other hand, NRG manufactured additional new documents attempting to reconcile its prior contradictory statements: one letter is dated May 6, sent to SACCWIS, the other dated May 19, sent to the

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<sup>4</sup> D.13-02-015, p. 42 (emphasis added). At a minimum, SCE should have had the opportunity to consider the OBGS units. “OTC plants that comply with SWRCB Track 2 policy ... without retiring are potential resources to meet SCE’s local procurement needs. Such plants may provide SCE with additional capacity options and potentially lower costs to ratepayers.” Finding 46, p. 89.

<sup>5</sup> *Ibid.*

<sup>6</sup> NRG response, p. 9.

Commissioners as an *ex parte* communication. In an effort to recast its February 2016 letter, NRG explains that what it really meant was only that it was “retain[ing] a Track 2 compliance option for Ormond Beach for contingency planning[.]” NRG’s statements in the February letter are, however, unequivocal and cannot reasonably be interpreted to mean that NRG *did* intend to retire the OBGS units. Further, NRG’s newly manufactured statements present, at best, a disputed issue of material fact, determination of which is outside the scope of this motion.

**1. The new evidence showing that OBGS units may not retire remains.**

NRG acknowledges that the Track 1 decision is premised on the OTC units retiring as set out in the SWRCB schedule. What NRG cannot do is recast its strident February 2016 statements that NRG does not intend not to retire OBGS, and therefore would not submit a retirement plan, and that it intended to continue that operation after 2020. These representations were made to the SWRCB, the agency to which NRG is primarily accountable under the OTC schedule.

As the operator of both the OBGS and Mandalay units, NRG responded in no uncertain terms to the SWRCB’s question: “do you intend to retire the generating station?” As to the Mandalay OTC units, NRG has consistently attested that it intends to retire and replace them with the proposed Puente plant.<sup>7</sup> In the event Puente is not approved, NRG may pursue Track 1 or Track 2 compliance options for the Mandalay OTC units. By contrast, although the Commission authorized procurement specifically to replace *both* the Mandalay and the OBGS retirements, NRG has never characterized Puente as a replacement for OBGS.

NRG’s February 2016 response to the SWRCB’s inquiry regarding its OBGS retirement plans were equally unequivocal. NRG stated that it “does *not* intend to retire” the plant “by the December 31, 2020 compliance date, but rather *intends to comply* by satisfying Track 2 of the Policy.” It nowhere states an intention to retire OBGS and cease operations past 2020. Contrary to its new May 6 assertions, NRG did not represent its intention only to retain a Track 2

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<sup>7</sup> See, e.g. [http://www.waterboards.ca.gov/water\\_issues/programs/ocean/cwa316/powerplants/mandalay/docs/mandalay\\_letter\\_04282015.pdf](http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/powerplants/mandalay/docs/mandalay_letter_04282015.pdf)

compliance “option.” The February 2016 letter repeats in various sections, simply and clearly, that NRG will not retire the OBGS units. Accordingly, NRG’s argument that CEJA “misunderstands” the statements in the February 2016 letter are untenable. The letter’s plain language speaks for itself.

In response to CEJA’s motion, and seeking a second bite at the motion practice that allowed it only one responsive pleading, on May 19, 2016, NRG wrote yet another letter regarding OBGS, this time to the Commissioners as an *ex parte* communication at the last possible moment prior to the start of the quiet period. The latest letter was not directed to the SWRCB, or to the SACCWIS, or to any of the entities to which the Commission and CAISO look for guidance on OTC retirement dates. The May 19 letter seeks to assure the Commissioners that there is no ambiguity, and that NRG will retire the OBGS units by 2020. Yet the letter still does not acknowledge that Puente is meant to replace the OBGS units.

**2. There is no evidence that NRG intends to replace the OBGS with the proposed Puente plant.**

NRG’s failure to acknowledge that Puente replaces OBGS as well as the Mandalay units suggests it intends to make OBGS available for CAISO to act upon. In the Track 1 proceeding, CAISO sought significantly more generation in the Moorpark subarea.<sup>8</sup> Although the Commission decided, based on all four units retiring, that 215 MW was sufficient, it is no secret that CAISO has exercised significant influence to seek contract extensions for existing facilities despite LTPP outcomes.<sup>9</sup> NRG’s continuing failure to state that it views Puente as a replacement for all its local OTC units supports the inference that it anticipates keeping one or more unit at OBGS online. At the very least, there is an issue of disputed fact over a material issue.

Further, NRG’s May 6 letter still does not describe retiring the OBGS units. Even without a Track 1 or Track 2 compliance plan, if the SACCWIS determines OTC units are needed, it has the authority to require them to stay online. Simply claiming to have abandoned

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<sup>8</sup> D.13-02-015, p. 68.

<sup>9</sup> See e.g. CAISO Basis and Need for CPM for Sutter Energy Center, (Dec. 2011) available at [https://www.aiso.com/Documents/Basis\\_Need\\_CapacityProcurementMechanismDesignation\\_SutterEnergyCenter.pdf](https://www.aiso.com/Documents/Basis_Need_CapacityProcurementMechanismDesignation_SutterEnergyCenter.pdf)

entrainment studies does not mean NRG will retire OBGS. NRG's May 19 letter appears to make clearer statements, but fails either to retract the February and May assertions that, were the SWRCB to take action, OBGS would stay online. It also fails to concede that Puente is replacing OBGS, leaving the door open for both plants to burden the Oxnard community that has born the burden of the region's gas-fired generation and industrial pollution for generations.

If considered on the record, NRG's new statements indicating that NRG does not intend to continue operating the Ormond units after 2020, or that it does expect to retire OBGS, present a disputed issue of material fact that must be resolved only after the new evidence is admitted and the parties are allowed to further explore and brief the issue.

**C. At Most, NRG's New Additional Evidence Raises a Dispute of a Highly Material Fact and Behooves Reopening the Record and Discovery.**

CEJA has met its burden in making its Motion, and its new evidence should be admitted to correct the record and so the Commission may determine the facts and interpret their legal and policy implications. In violation of Commission Rule 13.14, NRG and SCE seek to submit additional new evidence -- NRG's May 6, 2016 letter. But a motion to reopen the record is not the proper vehicle to evaluate the weight of new evidence, let alone weigh the probative value of one piece of evidence against another.<sup>10</sup> NRG also offers a draft analysis by Statewide Advisory Committee on Cooling Water Intake Structures ("SACCWIS"), purporting to support its contention that OBGS is modeled off line. This evidence is not new – the agencies have all modeled and presumed OBGS off line by its retirement date. The draft SACCWIS analysis should not be admitted into the record.

Purportedly in opposition to CEJA's motion, CAISO offers its own interpretation of the new evidence regarding local area need. "Based on available capacity, this indicates an unmet Moorpark sub-area need of approximately 214 MW in 2021."<sup>11</sup> CAISO's footnote 8 notes that this calculation assumed retirement of Ormond and Mandalay OTC units. By contrast, the Track 1 decision was based on CAISO's calculation that the Moorpark sub-area would have more than double that need. There, the Commission observed that "[CA]ISO recommends LCR

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<sup>10</sup> See Rule 13.14, which simply provides a motion "shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced."

<sup>11</sup> CAISO Response to Motion, p. 3.

procurement of 430 MW in the Moorpark sub-area of the Big Creek/Ventura local area under all RPS scenarios, without a range for effectiveness of sites.”<sup>12</sup> This proceeding is ratesetting in nature, and the Commission’s decision must be supported by facts on the record.<sup>13</sup> The record must include the material facts; failure to do so would deprive the parties of their due process rights. That NRG generated new letters to rebut CEJA’s motion does not and cannot, in itself, defeat the merits of the motion.<sup>14</sup> Rather, at most, NRG’s newly created documents created an issue of disputed fact. NRG’s internally contradictory statements are not simply vague or ambiguous, rather, it is impossible for NRG to both intend to retire the OBGS units and intend to keep continue to operate the units past 2020. Further, NRG’s May letters were clearly manufactured in a last-ditch effort to backpeddle from its stated plan to continue operating the OBGS units, and support an adverse credibility determination.

If the ALJ determines that NRG’s new evidence presents a genuine dispute of the material fact, it is improper to resolve that dispute by way of this Motion. The appropriate action is to reopen the record to admit the new evidence and allow the parties to conduct additional discovery, before weighing the evidence. Further, any weight given to NRG’s new evidence should be extremely low, as it is a *post hoc* effort to re-cast its own prior statements to allow NRG to pursue both a new generating unit and the possibility of keeping two old units online.

## II. CONCLUSION

CEJA respectfully requests the record be reopened to include the new material evidence regarding the change to the local need finding, and underlying authorization for SCE’s procurement.

DATED: May 23, 2016

COMMUNITIES FOR A BETTER  
ENVIRONMENT

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<sup>12</sup> D.13-02-015, p. 68.

<sup>13</sup> Commission Rule 8.3(k) (Commission decisions are to be based on evidence in the record.)

<sup>14</sup> This is doubly the case for the letter NRG wrote directly to the Commissioners on May 19, in response to CEJA’s motion, baldly asserting that NRG intends to retire OBGS, unless it is told to keep OBGS online.