

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) Regarding the Future Disposition of the Mohave Generating Station.

Application 02-05-046
(Filed May 17, 2002)

ADMINISTRATIVE LAW JUDGE'S POST-HEARING RULING ON ADMISSION OF EXHIBITS AND MOTION TO STRIKE TESTIMONY

Summary

This ruling admits the following documents into the record in this proceeding: 1, 8, 13, 19, 28C, 41, 42, 43, 44, 121, 122, 123, 124, 125, 126, and 127. Exhibit 28C will remain a confidential document. The motion to strike Attachment A to Exhibit 18 is denied, as is the Navajo Nation's (Navajo) motion to strike portions of Southern California Edison Company's (SCE) witness Mr. Nelson's (Nelson) testimony. Although these disputed documents and testimony are part of the record, parties may argue as to the relative value and weight they should be accorded based on the arguments raised as to their admissibility.

Background

At the conclusion of four weeks of evidentiary hearings parties requested time to consider the admission of certain documents, brief the admission of a confidential document, Exhibit 28C introduced by the Utility Reform Network (TURN), and respond to motions to strike brought by the Hopi Tribe (Hopi), the Navajo, and Peabody Western Coal Company (Peabody). Briefs on the

admissibility of Exhibit 28C were received on July 16, 2004 from TURN, Office of Ratepayer Advocates (ORA), SCE, Navajo, Water & Energy Consulting (WEC), and Natural Resources Defense Counsel (NRDC). Peabody and the Navajo also included arguments in their brief against the admission of Exhibits 1, 19, and Attachment A to Exhibit 18.

SCE, Peabody, and TURN moved to have documents received into the record, and only the Navajo objected to the admission of TURN's Exhibit 42.

The Navajo also included a motion to strike portions of SCE witness Nelson's testimony in its brief.

Admission Of Exhibits Into Evidence

Due to the length of the hearings, not all witnesses were called for cross-examination, and numerous parties waived cross-examination of other witnesses. Therefore, there were times when some counsel were not present in the courtroom when other parties requested the movement of certain documents, including the prepared testimony of witnesses who were not going to be cross-examined, into evidence. In order to insure that the record was as complete as possible, the parties, with the agreement of the Administrative Law Judge (ALJ), arranged a mechanism to allow all parties to weigh in on the admission of the not-yet-received-in-evidence exhibits. The parties arranged a joint telephonic conference call on Wednesday July 14, 2004 to discuss the exhibits.

Exhibits 41, 42, 43, and 44

Exhibits 41, 42, 43 and 44 are TURN's cross-examination exhibits used in the examination of SCE witness Nelson. During the July 14, 2004 telephonic conference, counsel for TURN notified participants that TURN intended to move these exhibits into evidence and gave the parties until July 16, 2004 to review the materials and reply. Only the Navajo objected to the admission of Exhibit 42.

Exhibit 42 consists of SCE's responses to TURN and WEC data requests. The Navajos oppose the admission of this exhibit on the grounds that TURN should have included this information as part of its prepared testimony or rebuttal testimony. Instead, by introducing it as an exhibit at hearing, TURN deprived the Navajo's expert witness of the opportunity to rebut the assertions in the exhibit.

While it might be true that TURN could have included the information in the data requests as part of prepared testimony, more latitude is allotted for cross-examination exhibits. TURN argues that it used Exhibit 42 to cross-examine Nelson in order to clarify what assumptions were, and were not, used to calculate expected costs of power from Mohave post-refurbishment. Under the framework that this document was used for cross-examination, Exhibit 42 is admitted into evidence.

Therefore, Exhibits 41, 42, 43, and 44 are all admitted into evidence.

Exhibits 8 and 13

Exhibits 8 and 13 are the two volumes of the prepared testimony of SCE witness Mr. Wolf (Wolf). All parties waived cross examination of Wolf and no party objected to the admission of these exhibits. The exhibits having previously been marked for identification as Exhibits 8 and 13 are admitted into evidence.

Exhibits 121 through 127

Exhibits 121 through 127 are exhibits that were not identified during the evidentiary hearing and the parties requested their identification, and subsequent admission, into evidence during the July 14, 2004, telephonic conference.

Exhibit 121: A set of data request responses from Peabody to SCE with regard to the testimony of Peabody's witness, Mr. Fletcher

(Fletcher). All parties waived cross examination of Fletcher and no party objected to the admission of this exhibit, it therefore is identified as Exhibit 121 and admitted into evidence.

Exhibit 122: A stipulation of Peabody and SCE with respect to certain coal quality issues. Based on this stipulation all parties waived cross-examination of Peabody witness Mr. Stringfellow (Stringfellow) and SCE witness Wolf. No party objected to the admission of this exhibit. Therefore, it is identified as Exhibit 122 and admitted into evidence.

Exhibit 123: A set of data request responses from the town of Laughlin, Nevada to SCE. All parties waived cross-examination of the Laughlin witness, Ms. Brady. No party objected to the admission of this exhibit. Therefore, it is identified as Exhibit 123 and admitted into evidence.

Exhibit 124: Prepared direct testimony of Peabody witness Fletcher, dated March 28, 2003. No party objected to the admission of this exhibit. Therefore, it is identified as Exhibit 124 and admitted into evidence.

Exhibit 125: Prepared direct testimony of Peabody witness Stringfellow, dated April 29, 2003. No party objected to the admission of this exhibit. Therefore, it is identified as Exhibit 125 and admitted into evidence.

Exhibit 126: Prepared supplemental testimony of Peabody witness Stringfellow, dated April 29, 2003. No party objected to the admission of this exhibit. Therefore, it is identified as Exhibit 126 and admitted into evidence.

Exhibit 127: Prepared rebuttal testimony of the Center for Energy and Economic Development, dated May 19, 2003. No party objected to the admission of this exhibit. Therefore, it is identified as Exhibit 127 and admitted into evidence.

Exhibits 1, 18, and 19.

Exhibits 1, 18, and 19 were marked for identification during the evidentiary hearing. Exhibit 1 is the prepared testimony of SCE witness Mr. Ray (Ray), Exhibit 18 contained the supplemental prepared testimony of several SCE witness and included a Confidential Appendix A, and Exhibit 19 included the prepared rebuttal testimony of two SCE witnesses, Ray and Nelson. Nelson's testimony in Exhibit 19, footnote 17, amended his original prepared testimony in Exhibit 1. When SCE moved to have these three exhibits received into evidence, some parties raised objections to the admission of certain pages of Exhibit 1 as amended by footnote 17 of Exhibit 19, and the confidential Appendix A of Exhibit 18. Exhibit 18 was received in evidence on July 1, 2004, without prejudice to parties moving to strike Appendix A. Exhibits 1 and 19 were not received into evidence pending briefing by the parties.

Exhibit 18, Confidential Appendix A

This appendix consists of production runs developed by SCE in its long-term resource plan where SCE compares the costs of a "Mohave-in" and a "Mohave-out" scenario. Peabody argues that this confidential appendix should not be admitted into evidence because it included SCE's forecast of natural gas prices, and this information was withheld from Peabody, the Navajo, and the Hopi on the ground of confidentiality. However, such information was made available to SCE's Procurement Review Group (PRG) as provided for by the confidentiality agreement controlling the two procurement dockets; Ruling (R) 01-10-024 and R.04-04-003.

Peabody argues that it was effectively precluded from cross-examining SCE witnesses on the cost-effectiveness of Mohave as compared with an alternative gas-fired facility of comparable size located at the Mohave site.

Peabody, and others are concerned that they were disadvantaged from critiquing SCE's analysis since critical information was either not made available to them, or they were not, because of confidentiality concerns, allowed to fully cross-examine the witnesses on the information.

While sympathetic to the claims of Peabody and the Indian Tribes that because of the confidentiality concerns they were denied the same participation rights that other parties had, the record will be more complete with confidential Appendix A to Exhibit 18. With over 125 exhibits in this proceeding, the Commission will not be basing its decision on one appendix to one exhibit. Therefore, Exhibit 18, with confidential Appendix A, will remain as an exhibit in the proceeding and the motion to strike is denied.

Exhibit 1, modified by footnote 17 to Exhibit 19 and Exhibit 19

Exhibit 1, as modified by footnote 17 to Exhibit 19, and Exhibit 19 will both be received into evidence. Footnote 17 to Exhibit 19 updates the analysis SCE witness Nelson presented in his prepared testimony on comparing the cost of a refurbished Mohave to the alternative gas facility. As with confidential Appendix A to Exhibit 18, the objection to Exhibit 1 and Exhibit 19 is that the cost comparison is based on confidential data, and Peabody and the Indian Tribes were not privy to this information limiting their ability to cross-examine the witness. Again, as stated above, the exhibits will be received into evidence to complete the record, but the Commission is mindful that it can not base its decision on evidence that was not provided to all parties and was not subject to complete and vigorous cross-examination.

Exhibit 28c: Turn Confidential Cross-Examination Exhibit

During its cross-examination of SCE witness Mr. Hemphill (Helphill) on the availability and cost of renewable energy alternatives to Mohave, TURN

introduced an exhibit that provided a table showing the top tier of binding bids from projects competing in SCE's recent interim renewable energy solicitation. This table was provided to SCE's PRG, but Peabody, the Hopi, and the Navajo were not given access.

Both Peabody and the Navajo filed briefs arguing vociferously that they would be prejudiced for a number of reasons if Exhibit 28C was admitted into evidence. For one, there was no effective cross-examination of the exhibit by the Navajo, the Hopi, or Peabody. In addition, Peabody and the Navajo argue that this information is not relevant, reliable, or necessary on the price and availability of renewable energy. The witness, Hemphill indicated that this document played no role in the preparation of his testimony. While he could authenticate the document, he could not address much else on the subject of renewable power. Therefore, Peabody and the Navajo contend that TURN only introduced the document to support its position that renewables may be lower cost than Mohave.

TURN, SCE, WEC, ORA, and NRDC filed briefs supporting the admission of Exhibit 28C. As WEC succinctly put it: "There are two distinct camps of parties in this proceeding: one which asserts that renewables are very expensive and not cost effective, and one camp which asserts that renewables are reasonably priced and cost effective generation sources." Even though WEC is not a member of the PRG and did not get to see Exhibit 28C, it supports its inclusion in the record for use by the Commission to help the Commission evaluate the opposing camps' assertions.

NRDC posits that the information contained in Exhibit 28C is recent, relevant, and reliable on the cost of alternatives and should come in the record.

ORA supports the inclusion of this document in the record in the interest of developing the record for use by the Commission.

SCE is basically focused on the highly sensitive nature of the information contained in Exhibit 28C, is adamant that the market participants not be allowed to see it, and argues that it really doesn't serve as a comparable resource for Mohave. Mohave is a baseload facility and thus Mohave and renewable resources are not fully comparable resources. In sum, SCE argues that Exhibit 28C should only be allowed in if its existing confidential status remains fully protected.

After weighing the arguments in the briefs, and reviewing the hearing transcript, I am persuaded that Exhibit 28C must remain confidential, but may come in the record. The reason I will let the document in is it is recent information on the cost of renewables that might be of interest to the Commission in making comparisons of Mohave and alternatives to Mohave. However, as the parties opposing its admission argued, Edison's "short-list" of potential renewable energy resources does not provide an "apples to apples" comparison to a base load facility the size of Mohave, does not address whether there are any subsidies that might affect the price of the renewable options, and does not address whether SCE is making a "least-cost, best-fit" analysis of these options vis-à-vis other options, or whether SCE is following state energy policy that requires certain percentages of renewables within specified time frames. Therefore, parties are free to argue in their post-hearing briefs that Exhibit 28C should be afforded weight commensurate with its relevance and probative value.

Motion To Strike Testimony

The Navajo Nation brought a motion to strike/find inadmissible testimony by SCE concerning a termination date for Mohave of 2026 and testimony by SCE

witness Nelson critiquing the Indian Tribes testimony on Operations & Maintenance (O&M) calculations to operate and maintain new plant facilities.

Obviously both of these categories of information influence the overall cost comparison of Mohave with any alternative facility. And, as the Navajo argue, this cost information was not made available to Peabody and the Indian Tribes and therefore was not subject to thorough cross-examination. In addition, the Navajo raise a compelling argument that in this case, the parties position in the case aligns up with their status as market/non-market participants. All of the non-market participants have access to the confidential information, yet, for the most part, they all favor replacing Mohave with an alternative source. Whereas, Peabody, the Navajo, and the Hopi are all categorized as market-participants, and they are desirous of keeping the Mohave facility fully operational. Therefore, as Peabody argues in its brief on the admissibility of the disputed documents, there was no “active debate” on the relevant issues raised by the confidential data. Unlike the Mountainview proceeding, where confidential information was also withheld from the market-participants, there were many non-market participants who shared the same, or similar, views to the market-participants so there was a full vetting and thorough cross-examination of the confidential testimony.

This is an important point for the Commission to factor in as it reads the post-hearing briefs and transcripts: the parties championing the continuation of Mohave as a coal burning facility were all denied access to confidential information under the terms of the confidentiality order in place for the proceeding. In the words of Peabody, these market participants had no “surrogate” for purposes of cross-examination that had access to the confidential information.

However, under the same rationale as articulated above, in order to have as complete a record as possible, the motion to strike is denied and the testimony will remain in the record. However, parties denied access to the information may argue that the disputed material should be given limited weight.

IT IS RULED that:

Exhibits 1, 8, 13, 19, 28c, 41, 42, 43, 44, 121, 122, 123, 124, 125, 126, and 127 are all received into evidence in this proceeding and will be part of the record. Exhibit 28C will remain a confidential document. The Motion to strike Attachment A to Exhibit 18 is denied. The Navajo motion to strike portions of Southern California Edison's testimony is denied.

Dated July 22, 2004, at San Francisco, California.

/s/ CAROL A. BROWN

Carol A. Brown
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties who have provided an electronic mail address, this day served a true copy of the original attached Post-Hearing Administrative Law Judge’s Ruling on Admission of Exhibits and Motion to Strike Testimony on all parties of record in this proceeding or their attorneys of record.

Dated July22, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

N O T I C E

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