

DOCKET

11-CAI-02

DATE AUG 29 2011

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:

)	
Complaint & Investigation)	Docket No. 11-CAI-02
Jurisdictional Determination Regarding East and)	
North Brawley Geothermal Developments)	
_____)	

**MOTION OF ORMAT NEVADA, INC. TO DISMISS
VERIFIED COMPLAINT AND REQUEST FOR INVESTIGATION BY
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

Ormat Nevada, Inc. (“Ormat” or “Respondent”) hereby moves for the California Energy Commission (“Commission”) to dismiss the Verified Complaint and Request for Investigation (“Complaint”) by California Unions for Reliable Energy (“CURE” or “Complainant”), in its entirety. CURE’s Complaint fails to state a claim that Ormat has violated a statute, regulation, order, program, or decision adopted, administered, or enforced by the commission, and therefore fails to meet the requirements of Section 1231, Title 20 of the California Code of Regulations and should be dismissed.

I. BACKGROUND.

Ormat is a developer of geothermal powerplant projects in Nevada, Hawaii and California with exploration and development in other western states. Through its subsidiaries, ORNI 18, LLC and ORNI 19, LLC, Ormat has developed the two powerplants at issue in this proceeding, the North Brawley Geothermal Development Project (“North Brawley”) and the East Brawley Geothermal Development Project (“East Brawley”), respectively.¹ On June 21, 2007,

¹Verified Answer of Respondent Ormat Nevada, Inc. to Verified Complaint and Request for Investigation by California Unions For Reliable Energy, filed concurrently herewith, hereinafter “Answer,” p. 1.

ORNI 18, LLC and Ormat submitted a conditional use permit (“CUP”) application for North Brawley to Imperial County for approval of a geothermal powerplant of less than 50 MW, associated facilities, and well field to supply resources.² The CUP application for North Brawley was approved on November 27, 2007.³ Construction of North Brawley began in⁴ December 2007. North Brawley is currently operating, and has been producing and selling increasing levels of capacity from the facility since 2008.⁵

On August 8, 2008, more than a year after the CUP application for North Brawley was submitted, ORNI 19, LLC and Ormat submitted a CUP application for East Brawley to Imperial County.⁶ This application was ultimately put on hold by Imperial County on October 23, 2008 due to difficulties obtaining a water supply for East Brawley.⁷ On January 29, 2010, ORNI 19, LLC submitted a revised project description for East Brawley to Imperial County. The Notice of Preparation for an Environmental Impact Report (“EIR”) for East Brawley was posted on June 17, 2010, and the draft EIR for the project issued on March 20, 2011.⁸ The final EIR for East Brawley has not yet been issued. Ormat’s Answer and accompanying attachments, which are hereby incorporated by reference into this motion, provide additional details regarding North Brawley and East Brawley.

On June 28, 2011, CURE submitted its Complaint alleging that Ormat violated the Warren-Alquist Act (citing Pub. Resources Code §§ 25110, 25120, 25500) and the California Code of Regulations (citing Title 20, § 2003) by not seeking Commission certification of North

² Answer, p.6, Appendix D.

³ Answer, p.6.

⁴ Answer, p. 6.

⁵ Answer, p. 6.

⁶ Answer, p. 6.

⁷ Answer, p. 6.

⁸ Answer, p. 6.

Brawley and East Brawley.⁹ CURE alleges that the facilities are “individually and collectively subject to the Commission’s jurisdiction”¹⁰ on the basis that (1) the generating capacity of North Brawley is 50 MW; (2) the generating capacity of East Brawley is 50 MW; and (3) North Brawley and East Brawley are a single facility such that the combined generating capacity of the two facilities is 100 MW.¹¹

CURE’s Complaint fails on two grounds. First, CURE has failed to even assert that the generating capacity of either North Brawley or East Brawley is 50 MW or more using the Commission’s methodology for determining the generating capacity of thermal powerplants. Instead, CURE offers irrelevant and incorrect facts and conclusory allegations that cannot by law support a finding of jurisdiction. Second, CURE has failed to assert facts, beyond conclusory allegations or misrepresentations regarding the design of North Brawley and East Brawley, demonstrating that the generating capacity of North Brawley and East Brawley should be aggregated for the purpose of determining the Commission’s jurisdiction over the two projects.

Accordingly, Ormat moves for the Commission to dismiss both CURE’s claim that Ormat violated the Warren-Alquist Act by failing to license the North Brawley and East Brawley facilities through the Commission, and CURE’s claim that Ormat violated the Warren-Alquist Act by failing to license a 100 MW geothermal facility, and thereby dismiss the Complaint in its entirety. Ormat also moves the Commission to dismiss CURE’s Complaint on the basis that the complaint is barred by the doctrine of laches, as CURE has unreasonably delayed filing its complaint, and such delay is prejudicial to Ormat. Ormat has filed this Motion concurrently with its Answer to Verified Complaint and Request for Investigation by California Unions for

⁹ Complaint, pp. 16-18. Public Resources Code Section 25120 defines the Commission’s jurisdiction to apply to thermal powerplants “with a generating capacity of **50 megawatts** or more.” Thermal powerplants with a generating capacity less than 50 MW are exempt from the Commission’s jurisdiction.

¹⁰ Complaint, p. 15.

¹¹ See generally Complaint, pp. 15-22.

Reliable Energy (“Answer”), and incorporates by reference all facts and arguments therein.

II. DISCUSSION

A. **The Complaint Fails to Allege That the Generating Capacity of Either North Brawley or East Brawley, Calculated Pursuant to the Commission’s Methodology, is 50 MW or more and that Ormat Has Violated the Warren-Alquist Act.**

CURE’s Complaint fails to show that the generating capacity of either North Brawley or East Brawley, as calculated pursuant to the Commission’s methodology, is 50 MW or more.¹²

The Commission has adopted a clear and objective method of assessing the generating capacity of thermal power plants for the purposes of determining whether a facility is subject to the Commission’s exclusive permitting jurisdiction. As set forth in Section 2003 of the Commission’s regulations, the generating capacity of an electrical generating facility is the difference between the maximum gross rating of the plant’s turbine generator(s) in megawatts and the minimum auxiliary load for the facility.¹³ For geothermal facilities the minimum auxiliary load includes the minimum electrical operating requirements for the associated geothermal field, which are necessary for the operation of, and supplied directly by, the power plant.¹⁴

Rather than determining the generating capacity of North Brawley and East Brawley pursuant to the Commission’s prescribed methodology, CURE presumptively concludes that the generating capacity of North Brawley and East Brawley is 50 MW each based solely on language from a California Public Utilities Commission resolution approving a Southern California Edison advice letter for the North Brawley PPA .¹⁵ However, the contract capacity

¹² See Answer, pp. 1-4.

¹³ 20 C.C.R. § 2003.

¹⁴ 20 C.C.R. § 2003(c).

¹⁵ Complaint, p. 2.

contained in a PPA is irrelevant and not determinative of whether the Commission has licensing jurisdiction over a project.

As set forth in Ormat's Answer, pursuant to the Commission's adopted methodology, the generating capacities of North Brawley and East Brawley are each 49.5 MW without taking into consideration resource constraints.¹⁶ Therefore, neither North Brawley nor East Brawley is subject to the Commission's jurisdiction. CURE has not used the methodology adopted in the Commission's regulations in asserting that generating capacities of North Brawley and East Brawley trigger the licensing jurisdiction of the Commission. As such, CURE's Complaint should be denied as CURE has failed to allege a violation of the Warren-Alquist Act, any regulation, or other order, program or decision of the Commission.

B. The Complaint Fails to Allege a Violation of the Warren-Alquist Act Because North Brawley and East Brawley are Separate and Distinct Projects.

Consistent with the Commission's policies for determining whether it is appropriate to aggregate the generating capacities of two projects for the purpose of determining Commission jurisdiction, the Commission should dismiss CURE's Complaint as North Brawley and East Brawley are distinct and separate projects. While the generating capacities of multiple generating machines on a site can be aggregated for the purposes of determining the Commission's jurisdiction,¹⁷ there is no support for CURE's proposition that the generating capacity of facilities located on separate sites may be aggregated for the purposes of determining Commission jurisdiction, especially where, as here:

¹⁶ Answer, pp.2-3.

¹⁷ Proposed Order on the Commission's Jurisdiction Over the Proposed U.S. Dataport Generating Facility, 00-JUR-1 (Feb. 7, 2001). Although this proposed decision was ultimately not considered by the Commission, this proposed decision is indicative of the Chief Counsel's guidance on the issue.

- (1) The East Brawley application for a conditional use permit (“CUP”) was submitted to Imperial County more than a year after North Brawley’s CUP application, and the two projects are currently a minimum of three years apart in schedule;
- (2) North Brawley and East Brawley are located 1.75 miles apart on separate, non-adjointing sites;
- (3) The sites of the two projects are physically separated by the New River;
- (4) The projects do not currently share, or propose to share, a water supply agreement, interconnection agreement, or transmission service agreement; and
- (6) The projects’ designs are different, with only the East Brawley facility employing a unique project design that reduces the facility’s water demand, an improved noncondensable gas treatment system, and improved sand separation system.¹⁸

Contrary to CURE’s allegation that the “facts of this case are the same as the LuzSEGS Units III-VII proceeding,”¹⁹ where the Commission aggregated the generating capacities of multiple solar generation units in asserting jurisdiction over the project,²⁰ the facts in this proceeding are completely different from the LuzSEGS case. First, the LuzSEGS units were located on contiguous parcels in a common location, separated only by utility and access roads shared by the facilities.²¹ North Brawley and East Brawley are located on nonadjacent sites separated by the New River, and the two powerplants are 1.75 miles apart. Second, where the LuzSEGS facilities were identically designed, and conceived and developed simultaneously by LUZ,²² North Brawley and East Brawley have been planned and developed separately, employ

¹⁸ Answer, pp. 2-9.

¹⁹ Complaint, p. 19.

²⁰ In the Matter of Staff Investigation of Possible Energy Commission Power Facility Siting Jurisdiction over Five 30 Megawatt Units Known As LuzSEGS Units III-VII, *Resolution Providing Direction to Staff*, p. 1, Appendix I, p. 3 (Oct. 29, 1986) (“LuzSEGS Decision”), provided with Complaint, Attachment L,

²¹ LuzSEGS Decision, p. 5.

²² LuzSEGS Decision, Appendix I, pp. 2-3.

different designs, and are at least three years separated in time.²³ Third, where the Luz SEGS facilities shared utility services for water, a water supply pipeline, road access, and electrical interconnection, North Brawley and East Brawley will not share utility services for water, will each have separate water supply pipelines, individual substations, and will have separate interconnection and transmission service agreements with IID.²⁴

Simply put, there is no basis to conclude that North Brawley and East Brawley constitute a single facility under the Warren-Alquist Act, as the facts show that these are two separate and distinct projects. Accordingly, aggregation of the generating capacities of North Brawley and East Brawley is inconsistent with Commission precedent, including the Luz SEGS resolution cited by CURE. CURE's Complaint should be dismissed.

C. CURE's Complaint is Barred by the Doctrine of Laches.

CURE's Complaint is barred by laches. The doctrine of laches precludes a complaint brought after unreasonable delay, where the delay results in prejudice or injury to the respondent.²⁵ Given that North Brawley was approved by Imperial County almost four years ago and is currently operating, and that East Brawley has been in the permitting process for three years, CURE's delay in bringing this complaint is patently unreasonable, and is extremely prejudicial to Ormat, who has invested substantial time, money, and resources in these two projects. Therefore this complaint is barred by laches.

D. The Complaint is Intended to Harass Ormat for Purposes of Gaining an Advantage in Unrelated Labor Negotiations and Should Be Dismissed by the Commission.

As this Commission knows well, CURE engages in a pattern and practice of Commission interventions to promote labor organizing objectives of CURE's member unions. This practice

²³ Answer, pp. 2-9.

²⁴ Answer, pp. 2-9.

²⁵ *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal. App. 3d 710, 719.

calls into question the legitimacy of CURE's Complaint, and justifies at a minimum strictly holding CURE to applicable rules of pleading, proof and doctrines of fairness. CURE is a sophisticated, experienced and well-funded organization represented by counsel very familiar with this Commission's rules. Allowing CURE to force developers to incur project risk and legal fees defending spurious and baseless claims, and forcing the Commission to incur time and cost hearing such claims, is an abuse of this Commission and CEQA. It is precisely this type of self-interested obstructionism masquerading as legitimate environmental interest that fuels calls for reform of CEQA and the Warren-Alquist Act. The Commission should send a strong message to CURE, and other potential parties seeking to abuse the Commission's complaint process, that such complaints will be readily dismissed if they do not at least make a *prima facie* case worthy of investigation.

III. CONCLUSION

For the foregoing reasons, Ormat respectfully requests that the Commission dismiss CURE's Complaint.

Dated: August 29, 2011

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

Christopher T. Ellison
Samantha G. Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Ormat Nevada, Inc.

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

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ORMAT NEVADA, INC. Brought By) Docket No. 11-CAI-02
CALIFORNIA UNIONS FOR RELIABLE)
ENERGY)
_____)

PROOF OF SERVICE

I, Karen A. Mitchell, declare that on August 29, 2011, I served the attached MOTION OF ORMAT NEVADA, INC. TO DISMISS VERIFIED COMPLAINT AND REQUEST FOR INVESTIGATION BY CALIFORNIA UNIONS FOR RELIABLE ENERGY via electronic and U.S. mail to all parties on the attached service list.

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



Karen A. Mitchell

SERVICE LIST
11-CAI-02

RESPONDENT

Ormat Nevada, Inc.
6225 Neil Road
Reno, NV 89511

COUNSEL FOR RESPONDENT

Christopher T. Ellison
Samantha Pottenger
Ellison, Schneider and Harris, LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
cte@eslawfirm.com
sgp@eslawfirm.com

COMPLAINANT

California Unions for Reliable Energy
c/o Adams Broadwell Joseph & Cardozo
Marc D. Joseph
Tanya A. Gulesserian
Elizabeth Klebaner
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com
tgulesserian@adamsbroadwell.com
eklebaner@adamsbroadwell.com

INTERESTED
AGENCIES/ENTITIES/PERSONS

Imperial County Planning and Development
Services
801 Main Street
EI Centro, CA 92243

Imperial County Air Pollution
Control District
150 South 9th Street
EI Centro, CA 92243-2801

Imperial Irrigation District
333 E. Barioni Boulevard
Imperial, CA 92251

ENERGY COMMISSION
DECISIONMAKERS

Robert B. Weisenmiller
Chair and Associate Member
rweisenm@energy.state.ca.us

Karen Douglas
Commissioner and Presiding Member
kldougl@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

ENERGY COMMISSION
CHIEF COUNSEL

Michael J. Levy
Chief Counsel
e-mail service preferred
mlevy@energy.state.ca.us

ENERGY COMMISSION STAFF

Bob Worl
Project Manager
rworl@energy.state.ca.us

Jeff Ogata
Assistant Chief Counsel
jogata@energy.state.ca.us

ENERGY COMMISSION
PUBLIC ADVISER

Jennifer Jennings
Public Adviser
e-mail service preferred
publicadviser@energy.state.ca.us