

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

DOCKET

11-CAI-02

DATE Nov. 28 2011

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In the Matter of:

Complaint Against Ormat Nevada, Inc.
Brought By California Unions for
Reliable Energy

Docket No. 11-CAI-02

**CALIFORNIA UNIONS FOR RELIABLE ENERGY
COMMENTS ON THE
PRESIDING COMMITTEE'S PROPOSED DECISION**

November 28, 2011

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I. Introduction

California Unions for Reliable Energy (“CURE”) respectfully submits these comments on the Presiding Committee’s Proposed Decision pursuant to section 1104(e) of the Commission’s Rules of Practice and Procedure.

CURE alleged that Ormat Nevada Inc.’s North Brawley Geothermal Development Project and East Brawley Geothermal Development Project are jointly and severally subject to the Commission’s mandatory, exclusive jurisdiction pursuant to section 25500 of the Warren-Alquist Act, and that Ormat circumvented the Commission’s citing process by failing to file an Application for Certification for these facilities. The Proposed Decision recommends dismissing CURE’s complaint, but makes no recommendation regarding whether the Commission has jurisdiction over the North Brawley and East Brawley sites and facilities.

The Proposed Decision violates the Warren-Alquist Act. The Commission has mandatory, exclusive jurisdiction over the North Brawley and East Brawley sites and facilities and must assume jurisdiction pursuant to section 25500 and 25900 of the Warren-Alquist Act. The Commission has no discretion to ignore its exclusive authority.

II. The Proposed Decision Violates the Warren-Alquist Act

According to Ormat, 5 of its generating units have a combined net generating capacity of 49.5 megawatts. Yet, Ormat sought, and Imperial County granted, a permit for 6 generating units at its North Brawley facility.¹ Ormat is now seeking a permit from Imperial County for 6 generating units at its East Brawley site.² Using Ormat’s own data, it is undisputed that 6 generating units have a generating capacity of more than 50 megawatts.³ Thus, the permit granted by Imperial County and relied on by Ormat to construct the North Brawley facility is illegal. Similarly, the East Brawley permit, if granted, would be illegal. Under the Warren-Alquist Act, only the Commission can issue a permit for a thermal power plant with a net physical generating capacity of 50 megawatts or more.

Struggling mightily to find a reason to avoid exercising its mandatory, exclusive siting authority, the Committee’s Proposed Decision offers several reasons, none of which provide a legal basis for its desired conclusion.

¹ Exh. 200, Ormat, Appx. C; *id.* at p. 5; *id.* at Appx. D, p. 7.

² See Exh. 200, Ormat, Appx. B, p. 2; *see also* Exh. 47, Ormat, p. 3.10-7 (Draft Environmental Impact Report evaluating a power plant with up to six generating units).

³ 9/26/11 RT p. 60:23-61:16, 104:3-105:10, RT 120:20-121:3; *see* Exh. 203, Ormat, “North Brawley Geothermal Power Plant Net and Gross Power Calculations;” *see id.* at “East Brawley Geothermal Power Plant Net and Gross Power Calculations.”

First, the Committee concluded that the Commission lacks jurisdiction over North Brawley and East Brawley because CURE's witnesses did not consider such factors as fluid velocity, resource temperature, and well field capability when calculating the generating capacity of 5 generating units.⁴ CURE's witnesses did not consider these factors because they are legally irrelevant. According to the Commission's regulations, power plant "generating capacity" is determined based on the total generating capacity of the entire facility. The Commission must include the capacity of all proposed turbine generators to determine whether the Commission has jurisdiction.⁵ It is *undisputed* that the generating capacity of 6 generating units is 59 megawatts. The availability of fuel is irrelevant. Would a gas-fired power plant with a 100 megawatt generating capacity be outside the Commission's jurisdiction because the local gas utility decided to size the gas supply pipe to only provide half the necessary gas? Obviously not. The conclusion is the same here.

Second, the Committee concluded that the Commission lacks jurisdiction because a power plant with *fewer than 6 generating units* is not capable of producing more than 50 megawatts based upon power plant efficiencies.⁶ Again, the Committee's determination is irrelevant. Ormat holds a permit to construct and operate 6 generating units at the North Brawley site and seeks a permit to construct and operate 6 generating units at the East Brawley site. Each facility has a generating capacity of more than 50 megawatts. It simply does not matter what the capacity of a 5 unit plant may be. The permit is for 6 units. Imperial County has no authority to issue a permit for 6 generating units that have a combined capacity to generate more than 50 megawatts.

Third, the Committee concluded that the Commission lacks jurisdiction because economic constraints discourage Ormat from drilling additional wells at the North Brawley site to increase the generating capacity of a 5 generating unit project.⁷ The Committee's determination is indefensible. Even if Ormat determined that the *entire facility* were uneconomical, Imperial County has no authority to issue a permit for a facility with more than 50 megawatts of generating capacity. The permit was illegal the moment it was issued, regardless of the project's economics. By the Committee's logic, Fresno County has authority to issue a permit for a 1,000 megawatt nuclear plant because economic constraints would discourage developers from actually building the plant.

Fourth, the Committee concluded that the Commission lacks jurisdiction because transmission constraints prohibit Ormat from generating more than

⁴ See Proposed Decision, pp. 11-13.

⁵ See Pub. Resources Code § 25120; Cal. Code Regs., tit. 20, §§ 2001, 2003 subd. (b).

⁶ See Proposed Decision, pp. 8-10, 11-12.

⁷ See Proposed Decision, pp. 9, 10.

50 megawatts at the North Brawley site.⁸ The Committee's determination is wrong. The Commission has exclusive jurisdiction over the North Brawley site and is prohibited from relying on transmission constraints to conclude that it lacks jurisdiction.⁹ The express language of the Commission's regulations is reinforced by the Commission Staff's guidance interpreting section 2003, stating that transmission constraints may not be considered by the Commission in making a jurisdictional determination because "they are variable and can be used as a means of artificially limiting facility's output."¹⁰

Fifth, the Committee concluded that the Commission lacks jurisdiction because limitations imposed by permits prohibit Ormat from generating more than 50 megawatts at the North Brawley and the East Brawley sites.¹¹ The Committee's determination contradicts the Commission's own regulations. Imperial County cannot usurp the Commission's exclusive jurisdiction simply by imposing a permit condition. The Commission's regulations are based on the physical capacity of the facility, not a paper limitation imposed by an agency that has no legal authority to issue a permit.

Ormat applied for and received a permit for 6 generating units at North Brawley, and applied for a permit for 6 generating units at East Brawley. According to its own evidence, 6 generating units have the physical net generating capacity exceeding 50 megawatts. Thus, the Commission has exclusive, mandatory jurisdiction over the North Brawley and East Brawley sites and related facilities and is required to exercise its statutory authority pursuant to section 25500 of the Warren-Alquist Act.¹²

The fallacy of the Committee basing its conclusions on only 5 generating units, when the permit was issued for 6 generating units, is easily demonstrated. Imagine a developer seeking a permit from a local agency for a facility with 10 LM 6000 turbines, each with a net generating capacity of 49.9 megawatts. The local agency obviously has no authority to issue such a permit. Only this Commission has authority. It is legally irrelevant that the developer may decide to only build one of the 10 permitted generating units, or may find that the local natural gas supplier will only provide enough fuel to operate one unit at a time, or that it is uneconomic to operate more than one unit at a time, or that the developer's interconnection agreement cannot accommodate more than 49.9 megawatts of output. Such a permit is illegal because the Commission has exclusive, mandatory

⁸ Proposed Decision, p. 9.

⁹ (See Cal. Code Regs., tit. 20, § 2001; *see also* Cal. Code Regs., tit. 20, § 2003.

¹⁰ See California Energy Commission Staff, General Method for Determining Thermal Power Plant Generating Capacity, p. 1.

¹¹ Proposed Decision, pp. 9, 12.

¹² See Pub. Resources Code §§ 25500.

jurisdiction over that project. Under the Commission's own regulations, none of these factors allow a local agency to usurp the Commission's exclusive authority.

III. The Commission Must Assume Jurisdiction Over North Brawley and East Brawley

The Commission must assume exclusive siting authority over the North Brawley and East Brawley facilities. But this means only that it must require Ormat to submit an Application for Certification of the facilities. Just as in the Luz proceedings, this does not mean that the North Brawley facility must be dismantled, or even that it be turned off.¹³ It simply means that the Commission must perform its normal review of the facilities and establish appropriate conditions of certification.

IV. Conclusion

The Commission has the legal, non-discretionary obligation to assume siting authority over the North Brawley and East Brawley facilities. It should direct Ormat to submit an Application for Certification for these facilities.

Dated: November 28, 2011

Respectfully submitted,

/s/

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¹³ See In the Matter of Staff Investigation of Possible Energy Commission Power Facility Siting Jurisdiction over Five 30 megawatt Units Known as Luz SEGS Units III-VII, October 29, 1986, California Energy Commission Resolution Providing Direction to Staff ("Luz SEGS Decision").

DECLARATION OF SERVICE

I, Valerie Stevenson, declare that on, November 28, 2011, I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY COMMENTS ON THE PRESIDING COMMITTEE'S PROPOSED DECISION**, dated November 28, 2011. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

<http://www.energy.ca.gov/proceedings/11-cai-02/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

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- √ Served electronically to all e-mail addresses on the Proof of Service list;
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- √ by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method);

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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s
Valerie Stevenson

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