

**DOCKET**

**11-CAI-02**

DATE SEP 13 2011

RECD. SEP 14 2011

**STATE OF CALIFORNIA**  
**California Energy Commission**

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  
OPPOSITION TO MOTION OF ORMAT NEVADA, INC. TO DISMISS  
VERIFIED COMPLAINT AND REQUEST FOR INVESTIGATION**

September 13, 2011

Tanya A. Gulesserian  
Marc D. Joseph  
Adams Broadwell Joseph & Cardozo  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080  
(650) 589-1660 Voice  
(650) 589-5062 Facsimile  
tgulesserian@adamsbroadwell.com

Attorneys for the CALIFORNIA  
UNIONS FOR RELIABLE ENERGY

On June 30, 2011, CURE filed a Verified Complaint and Request for Investigation (“Complaint”), pursuant to Section 1231 of Title 20 of the California Code of Regulations, requesting that the Commission investigate whether Ormat violated State law by circumventing the Commission’s jurisdiction over the East and North Brawley Geothermal Projects (“Projects”).<sup>1</sup> On July 26, 2011, the Chairman of the Commission found good cause for the Commission to serve the Complaint on Ormat, ordered Ormat to file an Answer and directed Staff to prepare an assessment within seven days of receiving the Answer.<sup>2</sup>

On August 29, 2011, Respondent Ormat Nevada, Inc. (“Ormat”) filed a Motion to Dismiss the Complaint. Ormat alleged that the Complaint failed to assert that the generating capacity of the Projects is 50 MW or more using the Commission’s methodology for determining generating capacity and failed to assert facts demonstrating that the generating capacity of the Projects should be aggregated for the purpose of determining jurisdiction. Ormat also claimed that the Complaint is barred by the doctrine of laches.<sup>3</sup>

---

<sup>1</sup> Verified Complaint Verified Complaint and Request for Investigation against Ormat Nevada Inc., Docket No. 11-CAI-02 (June 30, 2011) (hereinafter “Complaint”).

<sup>2</sup> Service of Complaint and Scheduling Order, Docket No. 11-CAI-02 (July 26, 2011); *see also* Notice of Prehearing Conference and Evidentiary Hearing, Docket No. 11-CAI-02 (August 19, 2011), p. 3.

<sup>3</sup> Ormat also asserts that the Complaint is intended to harass Ormat for the purposes of gaining an advantage in unrelated labor negotiations and should be dismissed by the Commission. There are no and never have been any labor negotiations between any of CURE’s member unions and Ormat. CURE’s complaint simply asks the Commission to enforce its jurisdictional rules. It is not “abuse” to ask a State agency to require a sophisticated and experienced developer to comply with State law. We trust that the Commission will resolve this Complaint based on the merits.

Ormat's motion should be denied. Section 1231 of the Commission's regulations do not require CURE to make particular calculations in the Complaint and Ormat's mere disagreement with the facts set forth in the Complaint regarding generating capacity is not a legal basis to dismiss the Complaint.

The Complaint provides the information required by Section 1231 of the Commission's regulations. According to Section 1231, a complaint or request for investigation shall provide the following eight requirements:

- (1) the name, address, and telephone number of the person filing the complaint (complainant) or request for investigation (petitioner);
- (2) the name, address, and telephone number of the person allegedly violating the statute, regulation, order, or decision (respondent) or, in the case of a request for a jurisdictional investigation, the name, address, and telephone number of the person owning or operating, or proposing to own or operate, the project which is the subject of the request for investigation (respondent);
- (3) a statement of the facts upon which the complaint or request for investigation is based;
- (4) a statement indicating the statute, regulation, order, or decision upon which the complaint or request for investigation is based;
- (5) the action the complainant or petitioner desires the commission to take;
- (6) the authority under which the commission may take the action requested;
- (7) a statement by the complainant or petitioner specifically listing the names and addresses of any other individuals, organizations, and businesses which the complainant or

petitioner knows or has reason to believe would be affected by the relief sought; and

- (8) a declaration under penalty of perjury by the complainant or petitioner attesting to the truth and accuracy of any factual allegations contained in the complaint or request for investigation. If any of the applicants are corporations or business associations, the declaration shall be dated, signed, and attested to by an officer thereof....

The Complaint meets all of these requirements.<sup>4</sup> The Complaint provides the contact information for CURE and Ormat. The Complaint provides a thorough statement of facts alleging, among others, that Ormat is developing a 150 MW (gross) geothermal facility in the North Brawley Known Geothermal Resource Area, that the net generating capacity of the East Brawley project is equal to or greater than 50 MW and that the net generating capacity of the North Brawley project is equal to or greater than 50 MW.<sup>5</sup> The Complaint explains how Ormat violated Section 25500 of the Warren-Alquist Act<sup>6</sup> (“Act”) because the Project falls within the definition of a facility under Section 25110 of the Act.<sup>7</sup> The Complaint sets forth the pertinent regulations and the Luz SEGS Decision upon which the Complaint is based.<sup>8</sup> The Complaint requests that the Commission commence a jurisdictional investigation and request the Attorney General to petition for

---

<sup>4</sup> Staff pointed out in its Staff Assessment that CURE Omitted Ormat’s phone number. As CURE stated in its Prehearing Conference Statement, CURE is willing to file an amended complaint that provides Ormat’s phone number, if the Committee so directs. (Prehearing Conference Statement of California Unions for Reliable Energy, Docket No. 11-CAI-02 (September 12, 2011), p. 6; *See* Complaint.

<sup>5</sup> Complaint at pp. 2,5,6,9,11, 20.

<sup>6</sup> Public Resources Code §25500.

<sup>7</sup> Complaint at pp. 1, 12-22.

<sup>8</sup> Complaint at p. 15.

an injunction, among other actions, and sets forth the authority under which the Commission may take the requested actions.<sup>9</sup> Finally, the Complaint specifically lists the names and addresses of other individuals, organizations, and businesses which CURE knows or has reason to believe would be affected by the relief sought<sup>10</sup> and includes a declaration under penalty of perjury by CURE's attorney attesting to the truth and accuracy of factual allegations contained in the Complaint.<sup>11</sup>

On September 6, 2011, Staff filed Energy Commission Staff's Assessment of Complaint and Answer that reviews the sufficiency of the Complaint. Staff found that the Complaint "contains all of the required information pursuant to title 20, California Code of Regulations section 1231," except for a telephone number for Ormat Nevada.<sup>12</sup> Staff also questioned whether the "declaration under penalty of perjury" is properly signed by Elizabeth Klebaner, "attorney of record" for CURE when Section 1231(b)(8) of the regulations states that if a complainant is a corporation or business association, the complaint must be dated, signed and attested to by an officer thereof. Staff stated that CURE's description that it is a coalition of labor unions does not answer the question as to whether CURE is a corporation or business association.

---

<sup>9</sup> Complaint at pp. 15-16, 22-26.

<sup>10</sup> Complaint at p. 26.

<sup>11</sup> Complaint at p. 28.

<sup>12</sup>

As CURE stated in its Prehearing Conference, CURE is willing to file an amended complaint that provides Ormat's phone number, if the Committee so directs. However, CURE is neither a corporation or business association. As set forth in the Complaint, CURE is a coalition of labor unions whose members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants.<sup>13</sup> CURE is committed to building a strong economy and a healthier environment. Individual members of the unions that comprise CURE and that are themselves members of CURE live, work, recreate, and raise their families in Imperial County, including the vicinity of the North Brawley and the East Brawley facilities and, therefore, would be first in line to be exposed to any hazardous materials, air contaminants, or other health and safety hazards from the Projects. As set forth in CURE's Petition for Confidential Records, CURE is concerned that under-examined and piecemealed environmental review could result in undisclosed impacts to air quality, public health, water resources and biological resources, among others, and from hazards and hazardous materials and may reduce the environmental carrying capacity of the state.<sup>14</sup> In sum, since CURE is neither a corporation nor a business association, the Complaint need not be, and cannot be, dated, signed and attested to by an officer thereof. Because the Complaint provides

---

<sup>13</sup> Complaint at pp. 3-4.

<sup>14</sup> California Unions for Reliable Energy Petition for Inspection and Copying of Records Provided by Ormat Nevada, Inc., Docket No., 11-CAI-02 (September 9, 2011).

the information required by Section 1231 of the Commission's regulations, Ormat's motion to dismiss should be denied.

Finally, Ormat's claim that the Complaint is barred by the doctrine of laches fails as a matter of law. CURE did not unreasonably delay the filing of the Complaint since CURE only recently learned about Ormat's violations of the Warren-Alquist Act. Furthermore, the Complaint alleges ongoing violations of the Warren-Alquist Act. Laches does not apply to a complaint for violations alleged to be ongoing at the time of the complaint.<sup>15</sup>

Here, the County published a Notice of Availability of the Draft Environmental Impact Report ("DEIR") for the East Brawley Geothermal Project on March 15, 2011. CURE reviewed the DEIR, obtained documents regarding the East Brawley project and submitted comments on the DEIR on May 10, 2011. In preparing comments on the DEIR, CURE learned that, although the DEIR describe the East Brawley project as a 49.9 MW net geothermal power plant, the conclusion is unsupported and cannot be verified based upon the information provided in the DEIR and supporting documents. In preparing comments on the DEIR, CURE also learned that Ormat similarly described its North Brawley project as 49.9 MW, even though the generating capacity could not be verified, and that Ormat had received approvals for expansions of the well field for the North Brawley project

---

<sup>15</sup> See *Westly v. Cal. Public Emp. Retirement Sys. Bd.* (2003) 105 Cal.App.4th 1095, 105 Cal.App.4th at 1118 (citing *California Trout, Inc. v. State Water Resources Board* (1989) 207 Cal.App.3d 585, 631) (laches does not apply to ongoing violations); *FPI Development*, 231 Cal.App.3d at 384 (a defendant's laches defense was "simply immaterial" because it had no application to the plaintiff's claims of ongoing harm).

without any environmental review. Finally, in preparing comments on the DEIR, CURE learned that the North and East Brawley projects will be owned and operated by Ormat, are virtually identical, and are proposed on adjoining parcels of land, also owned or leased by Ormat and, thus, among other reasons, are one facility. Therefore, CURE only recently learned (less than three months prior to filing the Complaint) that Ormat avoided Commission jurisdiction through its practice of incrementally permitting and constructing the North Brawley and East Brawley facilities to develop one interconnected geothermal complex.

### III. CONCLUSION

The Complaint provides the information required by Section 1231 of the Commission's regulations. The Chairman of the Commission already found good cause for the Commission to serve the Complaint on Ormat, and Staff found that the Complaint contains the information required by the regulations. Ormat's Motion to Dismiss lacks merit and fails as a matter of law. Therefore, Ormat's motion should be denied.

Dated: September 13, 2011      Respectfully submitted,

\_\_\_\_\_  
/s/  
Marc D. Joseph  
Tanya A. Gulesserian  
Adams Broadwell Joseph & Cardozo  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080  
(650) 589-1660 Voice  
(650) 589-5062 Facsimile  
tgulesserian@adamsbroadwell.com  
Attorneys for the CALIFORNIA UNIONS  
FOR RELIABLE ENERGY

## DECLARATION OF SERVICE

In the Matter of Complaint Against Ormat Nevada, Inc. Brought By  
California Unions for Reliable Energy

Docket No. 11-CAI-02

I, Valerie Stevenson, declare that on September 13, 2011, I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY OPPOSITION TO MOTION OF ORMAT NEVADA, INC. TO DISMISS VERIFIED COMPLAINT AND REQUEST FOR INVESTIGATION** dated September 13, 2011. The original document, filed with the Docket Office, 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:

***(Check all that Apply)***

**For service to all other parties:**

- √ Served electronically to all e-mail addresses on the Proof of Service list;
- √ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with firstclass postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email service preferred."

**AND**

**For filing with the Docket Unit at the Energy Commission:**

- √ 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);

**OR**

by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

**CALIFORNIA ENERGY COMMISSION – DOCKET UNIT**

Attn: Docket No. 11-CAI-02  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

***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:

California Energy Commission  
Michael J. Levy, Chief Counsel  
1516 Ninth Street MS-14  
Sacramento, CA 95814  
[mlevy@energy.state.ca.us](mailto:mlevy@energy.state.ca.us)

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



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – WWW.ENERGY.CA.GOV**

***IN THE MATTER OF COMPLAINT AGAINST  
ORMAT NEVADA, INC. BROUGHT BY  
CALIFORNIA UNIONS FOR RELIABLE ENERGY***

**Docket No. 11-CAI-02  
(Revised 9/12/11)**

**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](mailto:cte@eslawfirm.com)  
[sgp@eslawfirm.com](mailto: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](mailto:mdjoseph@adamsbroadwell.com)  
[tgulesserian@adamsbroadwell.com](mailto:tgulesserian@adamsbroadwell.com)  
[eklebaner@adamsbroadwell.com](mailto:eklebaner@adamsbroadwell.com)

**INTERVENORS**

\*Imperial County Planning and  
Development Services  
Armando Villa,  
Planning Director  
801 Main Street  
El Centro, CA 92243-2811  
[armandovilla@co.imperial.ca.us](mailto:armandovilla@co.imperial.ca.us)

\*Remy, Thomas, Moose &  
Manley, LLP  
Howard F. Wilkins  
455 Capitol Mall, Suite 210  
Sacramento, CA 95814  
[hwilkins@rtmmlaw.com](mailto:hwilkins@rtmmlaw.com)

**INTERESTED  
AGENCIES/ENTITIES/PERSONS**

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

Imperial County Air Pollution  
Control District  
150 South 9th Street  
El 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](mailto:rweisenm@energy.state.ca.us)

KAREN DOUGLAS  
Commissioner and Presiding Member  
[kldougl@energy.state.ca.us](mailto:kldougl@energy.state.ca.us)

Kenneth Celli  
Hearing Officer  
[kcelli@energy.state.ca.us](mailto:kcelli@energy.state.ca.us)

**ENERGY COMMISSION STAFF**

Bob Worl  
Project Manager  
[rworl@energy.state.ca.us](mailto:rworl@energy.state.ca.us)

Jeff Ogata  
Assistant Chief Counsel  
[jogata@energy.state.ca.us](mailto:jogata@energy.state.ca.us)

**ENERGY COMMISSION  
PUBLIC ADVISER**

Jennifer Jennings  
Public Adviser  
*e-mail service preferred*  
[\\*publicadviser@energy.state.ca.us](mailto:publicadviser@energy.state.ca.us)