

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

tgulesserian@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
ROBYN C. PURCHIA

OF COUNSEL
THOMAS R. ADAMS
ANN BROADWELL

DOCKET

11-CAI-02

DATE SEP 15 2011

RECD. SEP 15 2011

September 15, 2011

Via Email and U.S. Mail

Commissioner Karen Douglas
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512
KLdougl@energy.state.ca.us

Chairman Robert B. Weisenmiller
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512
RWeisenm@energy.state.ca.us

Re: Complaint and Investigation Jurisdictional Determination Regarding East and North Brawley Geothermal Developments (Docket No. 11-CAI-02)

Dear Commissioner Douglas and Chairman Weisenmiller:

We are writing on behalf of California Unions for Reliable Energy to inform the Committee that, following CURE's September 9, 2011 Petition for Inspection and Copying of Records ("Petition"), Ormat stated its willingness to enter into a non-disclosure agreement with CURE and to provide CURE with a copy of the documents sought in the Petition. Today, CURE received the executed NDA and a CD with the confidential documents. Following our review of the CD, CURE anticipates withdrawing its Petition.

Despite Ormat and CURE's agreement, Ormat curiously filed an opposition to CURE's Petition yesterday. In that opposition, Ormat complains about the sufficiency of information in CURE's Complaint, while at the same time objecting to providing CURE with the information required to assess the Projects, which only Ormat holds. Specifically, Ormat objected to CURE's data requests, objected to filing and serving all documents in this proceeding and objected to extending the schedule in order to provide for the timely exchange of information and preparation of informed testimony. Ormat's objections have no merit.

Commissioner Karen Douglas
Chairman Robert B. Weisenmiller
September 15, 2011
Page 2

Complaint and investigation proceedings are adjudicatory proceedings under Article 4 of the Commission's regulations.¹ In the Service of Complaint and Scheduling Order, Chairman Weisenmiller provided that the governing procedures for resolution of the Complaint shall be those codified at Sections 1200 through 1236.5, together with the informal hearing procedures in Article 10 of the Administrative Procedure Act (Government Code §§ 11445.10 through 11445.60) ("APA").

The APA contains no express provisions authorizing or prohibiting prehearing discovery in informal proceedings. "The Legislature's silence with respect to prehearing discovery in administrative proceedings does not mean, however, that it has rejected such discovery."² Instead, discovery is determined on a case-by-case basis subject to the requirements of Chapter 4.5 of the APA, any other statute, regulation or ordinance governing discovery procedures and by analogy to common law in criminal cases.³ While the informal hearing procedures in the Government Code state that the presiding officer may limit or eliminate the use of discovery,⁴ no such limitation has been made in this proceeding. In fact, discovery is necessary in this proceeding due to Ormat's consistent failure to support its claims regarding generating capacity and Ormat's inconsistent references to the generating capacity of the East and North Brawley Geothermal Projects.

Similarly, Ormat's objection to filing and serving all documents in this proceeding is concerning and unsupported. The Commission's regulations clearly state, "[u]nless otherwise specified in these regulations, all materials filed with the commission shall be filed with the Docket Unit."⁵ Furthermore, the executive director "shall assure that all materials submitted to the commission shall be made available at the Docket Unit to the public" in accordance with the provisions of the California Public Records Act and the Commission's regulations.⁶ Finally, in no uncertain terms, the Commission's regulations provide that "[u]nless otherwise provided by the presiding member, ***a paper copy of all written material filed by any party in a proceeding shall be served...on every other party to the***

¹ 20 Cal. Code REg. §1230, et seq.

² *Shively v. Stewart* (1966) 65 Cal.2nd 475, 479.

³ *Id.*; see also California Administrative Hearing Practice, CEB, Second Edition, Chap. 5, §5.4, 5.8.

⁴ Gov. Code §11445.40.

⁵ 20 Cal. Code Reg. §1209(d).

⁶ *Id.*

Commissioner Karen Douglas
Chairman Robert B. Weisenmiller
September 15, 2011
Page 3

*proceeding...*⁷ Therefore, Ormat's submittal of multiple applications for confidential designation of information⁸ and other unknown documents to the Commission⁹, with no filings at the Docket Unit and with no service on CURE, which is the Complainant in this proceeding, violates the Commission's regulations.

After we review the CD to confirm receipt of confidential documents sought in CURE's Petition, CURE will notify the Committee regarding our withdrawal of the Petition.

Thank you for your consideration and attention to this matter.

Sincerely,

/s/

Tanya A. Gulesserian

TAG:vs

⁷ 20 Cal. Code Reg. §1210(a).

⁸ On September 9, 2011, CURE wrote to the Commission requesting that the Committee direct all parties to docket and serve all documents on all parties in this proceeding. At the time, CURE had learned about Ormat's September 2, 2011 application for confidential designation of information that Ormat failed to docket and serve on all parties. CURE learned just two days ago that Ormat submitted a second application for confidential designation on September 8, 2011. Clearly, the ability to participate in this proceeding is hindered by Ormat's failure to docket and serve documents. Yesterday, none of these correspondences were listed on the docket for this proceeding; today, they all appeared on the docket back-dated.

⁹ Assistant Chief Counsel Jeffrey Ogata stated that "some" of the documents were submitted with a request for confidentiality and that once they are able to separate out disclosable documents, they will send the disclosable document to CURE. (Email from Jeffrey Ogata to Tanya Gulesserian, dated September 6, 2011.)

DECLARATION OF SERVICE

I, Valerie Stevenson, declare that on, September 15, 2011, I served and filed copies of the attached **LETTER TO COMMISSIONER KAREN DOUGLAS and CHAIRMAN ROBERT B. WEISENMILLER**, dated September 15, 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:

(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

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

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
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

INTERVENORS

*Imperial County Planning and
Development Services
Armando Villa,
Planning Director
801 Main Street
El Centro, CA 92243-2811
armandovilla@co.imperial.ca.us

*Remy, Thomas, Moose &
Manley, LLP
Howard F. Wilkins
455 Capitol Mall, Suite 210
Sacramento, CA 95814
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

KAREN DOUGLAS
Commissioner and Presiding Member
kldougl@energy.state.ca.us

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