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September 30, 2011

<b>DOCKET</b>	
<b>11-CAI-02</b>	
DATE	SEP 30 2011
RECD.	SEP 30 2011

Chairman Robert B. Weisenmiller  
Commissioner Karen Douglas  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814-5512

Re: In the Matter of Complaint Against Ormat Nevada, Inc. Brought By California Unions for Reliable Energy, 11-CAI-02.

Dear Chairman Weisenmiller and Commissioner Douglas:

Respondent Ormat Nevada, Inc. (“Ormat”) and Intervenor Imperial County (“County”), respectfully request that the Committee expedite ruling on Respondent’s Motion to Dismiss the Verified Complaint of California Unions for Reliable Energy (“Complaint”).<sup>1</sup> As you know, at the close of Complainant CURE’s presentation of its case, Respondent Ormat and the County moved to dismiss the case on the basis that CURE had not met its burden of proof. After a conference, the Committee decided to neither grant nor deny the motion, electing instead to take it under submission and proceed to hear the remaining witnesses. At the conclusion of the hearing, the Hearing Officer announced that briefing of the motion would occur together with the overall briefs on the case. As a practical matter, postponing the briefing and ruling on the motion to that time effectively denies the motion. It forces the parties and the Committee to incur the expense and effort of a full briefing of the case, and postpones ruling on the motion to so near the end of the case as to make it meaningless.

Throughout this proceeding, Respondent has maintained that CURE’s Complaint is invalid, lacks any factual support, and fails to set forth a prima facie case alleging a violation of any statute, order, decision, or regulation adopted, administered, or enforced by the Commission as required by Commission regulations. The complete lack of factual support for CURE’s Complaint became even more apparent during the September 26, 2011 evidentiary hearing for

<sup>1</sup> County of Imperial joined in this motion at the September 26, 2011 hearing (September 26, 2011 Reporters Transcript, page 73).

this proceeding, where CURE failed to meet its burden to prove the allegations in its Complaint. CURE's own witnesses testified that they were not able to testify that North Brawley and East Brawley were individually capable of generating more than 49.5 net megawatts. Furthermore, CURE failed to present a witness to establish the facts alleged in its complaint regarding the aggregation of the generating capacities of North Brawley and East Brawley. In short, CURE has failed to prove the allegations in its complaint.

Postponement of a decision on the motion until after opening and reply briefs are filed in this proceeding is in effect a denial of the motion. The record in this proceeding shows that a motion to dismiss is proper due to CURE's failure to provide any evidence to support its allegation, and the principles of judicial economy, efficiency, and fairness require that a ruling on this motion be made prior to the expenditure of more resources on this frivolous complaint by not only all parties involved, but the Commission itself. For the reasons set forth below, Respondent respectfully requests that the Committee order CURE to brief the motion in three business days and thereafter to dismiss CURE's Complaint, with prejudice.

### **DISCUSSION**

#### **I. The Commission's Complaint Rules Appropriately Place the Burden of Proof on CURE and Require That CURE Provide a Witness in Support of its Claims.**

The real issue in this case is not whether the Commission has jurisdiction over the North Brawley and East Brawley Projects. The record overwhelmingly demonstrates that the projects at issue are properly within the County's jurisdiction. The real issue in this case is whether the Commission will enforce its own regulations that place the burden on a complainant to state a case in its complaint, and to support the complaint with evidence, for example with at least one witness to support each allegation. Thus far, the Commission has allowed CURE to proceed in violation of these requirements. Absent granting the motion to dismiss, Ormat is very concerned that this case will set a precedent encouraging CURE and others to file future unsupported complaints.

It is not necessary that a member of the public file a complaint to alert the Commission to a concern or to request that a matter be investigated. As Mr. O'Brien testified, any member of the public can write a letter or place a phone call and staff will investigate any suspicious activity. But a complaint goes much further: a complaint alleges a violation of law, and if a complaint satisfies the Commission's rules by stating a plausible case and having a supporting witness, the complaint requires that the Commission conduct a formal full adjudicatory hearing

and compels the respondent, a member of the public, to appear at the hearing and defend against the allegations.

Given the gravity of a complaint adjudication, and in particular that it compels a member of the public to expend time and expense to appear in defense of the allegations, the Commission's rules demand that the complaint state a clear and specific case showing a violation of law. More importantly, the rules demand that the complaint include a statement under penalty of perjury supporting the facts in the complaint to demonstrate at the time of filing that there is a witness prepared to testify in support of such facts. Section 1231 of the Commission's Rules is very clear that a complaint must include the following:

“(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; and

(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.

(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. Where a declaration is filed on behalf of a joint venture or proposed joint venture, all members of the joint venture or proposed joint venture shall date, sign, and attest to the declaration.” 20 C.C.R. Sec. 1231 (emphasis added)

In this proceeding, only CURE's attorneys verified the complaint and no affidavit of a witness prepared to testify at the hearing in support of the facts in the complaint was attached. As a matter of law, a verification by an attorney does not support or establish any fact at hearing.<sup>2</sup>

As the Committee properly noted at the outset of the hearing, CURE has the burden of proof in this proceeding. As shown above, the Commission's rules demand that CURE support that burden of proof with at least one witness, not simply by vague references to “documents” submitted in the hearing. The purpose of a witness is, among other things, to explain and

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<sup>2</sup> Cal. Code Civ. Pro. Section 446(a).

demonstrate the relevance of the documents to the Committee rather than forcing the Committee to wade through them without a witness to examine. A witness also allows cross-examination to bring forth whether the documents are out of date, taken out of context or otherwise unreliable.

In this case, however, despite having been given extraordinary discovery not contemplated in the rules to develop a case that should have been stated in the complaint<sup>3</sup>, CURE appeared at the hearing and offered no witness support for one of its two primary allegations and two witnesses that admitted they could not support the other primary allegation.

**II. CURE has failed to provide any evidence to support its allegation that the net generating capacity of North Brawley and East Brawley are 50 megawatts or more, respectively.**

The sole basis for the allegation in CURE's Complaint that the North Brawley facility is subject to the Commission's jurisdiction is a California Public Utilities Commission resolution that approves a power purchase agreement between North Brawley and Southern California Edison for the 50 megawatts. No other evidence is provided. However, as CURE's own witness testified, a power purchase agreement is irrelevant to the determination of the generating capacity of a powerplant. Furthermore, the mere allegation in CURE's Complaint that the net generating capacity of North Brawley is 50 megawatts or more, without substantiation, does not constitute evidence. Similarly, CURE's allegation that the net generating capacity of East Brawley is 50 megawatts or more suffers from a complete lack of evidentiary support. In fact, all of the exhibits to CURE's Complaint confirm that the net generating capacity of East Brawley will be less than 50 megawatts.<sup>4</sup> Thus, CURE's Complaint was fatally flawed from the outset as no facts were provided to support the allegations in its complaint.

Furthermore, despite having been given extraordinary discovery not contemplated by the Commission's complaint regulations, CURE's failure to provide any factual support for its allegations regarding the generating capacities of North Brawley and East Brawley was not remedied by the testimony of CURE's witnesses at the evidentiary hearing. Of the two witnesses

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<sup>3</sup>CURE issued data requests even though the Commission's regulations do not provide for discovery by the Complainant, to which Ormat responded. Thereafter, CURE was given the extraordinary right at a technical conference to question Ormat engineers at length in the manner of a deposition, where Ormat provided to CURE a remarkable amount of information, including even confidential and proprietary engineering information, after the complaint but prior to hearing. Conversely, CURE failed to respond to a data request seeking information regarding its intended testimony—information that by rule Ormat should have received in the complaint itself, and was allowed over Ormat's objection to surprise all parties with extensive oral testimony at hearing setting forth facts and allegations never included in the complaint. Despite all of these unfair advantages, CURE was still unable to provide any credible testimony at hearing supporting its claims as outlined below.

<sup>4</sup>CURE's Complaint, Exhibit D (Cover letter and Attachment 1, p. 1); Exhibit J, p. 1.

sponsored by CURE to testify regarding the generating capacities of North Brawley and East Brawley, one admitted that he had not reviewed the Commission's methodology for calculating the net generating capacity of the facilities prior to reaching his conclusions regarding the generating capacities of North Brawley and East Brawley. CURE's other witness testified that he could not testify that the generating capacities of North Brawley and East Brawley were more than 49.5 megawatts, respectively. Therefore, as CURE has failed to meet its burden to prove its allegations that the generating capacities of North Brawley and East Brawley are 50 megawatts or more pursuant to the Commission's regulations, CURE's Complaint must be dismissed, with prejudice.

**III. CURE has failed to provide any evidence to support its allegation that North Brawley and East Brawley are one facility, such that the generating capacities of the two plants should be aggregated.**

CURE's allegation that "North Brawley and East Brawley are one facility with a net generating capacity of 100 MW"<sup>5</sup> is completely devoid of any factual support. In support of its allegation that "the North Brawley facilities are one geothermal facility with a generating capacity of 100 MW"<sup>6</sup> CURE's Complaint makes the following assertions:

- North Brawley and East Brawley are proposed on adjoining parcels of land;
- Both facilities will interconnect to the electrical grid through one substation;
- North Brawley and East Brawley will share utility service between a water supply agreement between Ormat and the City of Brawley;
- North Brawley and East Brawley will be physically joined to facilitate cooling water blowdown delivery from the North Brawley facility to the East Brawley facility;
- The well fields associated with each facility will be physically interconnected through cables and brine and cooling water pipelines spanning the New River.<sup>7</sup>

Notably, none of these assertions are supported by the "Statement of Facts" contained within CURE's Complaint. Therefore, it is unclear whether the truth and accuracy of these statements are verified as required by Section 1231 of the Commission's regulations. However, even if one were to assume that the verification provided by CURE's attorney was intended to cover these assertions, verification by an attorney does not establish the facts alleged in the pleading.<sup>8</sup> No citations to any of CURE's exhibits are provided to support these assertions, and no witness was sponsored by CURE to testify to the truth of these assertions. In short, CURE

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<sup>5</sup> CURE's Complaint, p. 19.

<sup>6</sup> CURE's Complaint, pp. 20-21.

<sup>7</sup> CURE's Complaint, pp. 20-21.

<sup>8</sup> Cal. Code Civ. Pro. Section 446(a).

has completely failed to present any factual evidence that North Brawley and East Brawley are one facility such that the generating capacities of the two projects should be aggregated. As CURE has failed to meet its burden to prove this allegation, CURE's Complaint must be dismissed, with prejudice.

**CONCLUSION**

As CURE has failed to prove its allegations that (1) the generating capacities of North Brawley and East Brawley are 50 megawatts or more, respectively and (2) that the generating capacities of North Brawley and East Brawley should be aggregated, CURE's Complaint must be dismissed. Respondent respectfully requests that the Committee order a response from CURE within three (3) business days of the filing of this letter, and that the Committee issue a ruling on the motion to dismiss as soon as possible after CURE files its response.

Respectfully submitted:

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STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of Complaint Against )  
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 September 30, 2011, I served the attached *Letter Requesting Expedited Ruling on Motion to Dismiss* 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**

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