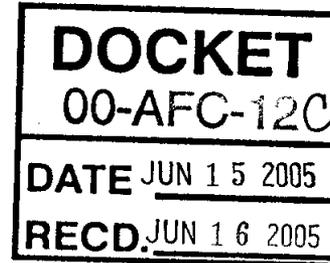


# City of Morro Bay

Morro Bay, CA 93442 • 805-772-6200

June 15, 2005



Dockets Unit  
California Energy Commission  
1516 Ninth Street, MS 4  
Sacramento, CA 95814

*Re: City of Morro Bay's Written Comments Re: Presiding Member's Proposed Amended Order Authorizing Demolition of Morro Bay Tank Farm  
Docket No. 00-AFC-12*

Please find enclosed the City of Morro Bay's Written Comments Re: Presiding Member's Proposed Amended Order Authorizing Demolition of Morro Bay Tank Farm. Please note that this document was submitted electronically on Tuesday, June 14, 2005.

Thank you for your attention to this matter. Should you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,

Robert Schultz  
City Attorney

enclosure

ADMINISTRATION  
595 Harbor Street

CITY ATTORNEY  
955 Shasta Avenue

FINANCE DEPARTMENT  
595 Harbor Street

FIRE DEPARTMENT  
715 Harbor Street

HARBOR DEPARTMENT  
1275 Embarcadero Road

POLICE DEPARTMENT  
870 Morro Bay Boulevard

PUBLIC SERVICES  
955 Shasta Avenue

RECREATION & PARKS  
1001 Kennedy Way

STATE OF CALIFORNIA  
STATE ENERGY RESOURCES

CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:

MORRO BAY MODERNIZATION  
AND REPLACEMENT PROJECT  
(DUKE ENERGY)

Docket No. 00-AFC-12

CITY OF MORRO BAY'S WRITTEN COMMENTS  
RE: PRESIDING MEMBER'S PROPOSED  
AMENDED ORDER AUTHORIZING DEMOLITION  
OF MORRO BAY TANK FARM

Robert W. Schultz, Esq.  
City Attorney  
City of Morro Bay  
595 Harbor Street  
Morro Bay, CA 93442  
(805) 772-6200  
(805) 772-6572 (Facsimile)  
[rschultz@morro-bay.ca.us](mailto:rschultz@morro-bay.ca.us)

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

The City of Morro Bay ("City") respectfully submits its written comments pursuant to the Notice of Commission Hearing To Consider Presiding Member's Amended Order Authorizing Demolition of the Morro Bay Tank Farm. Although the City disagrees with some of the conclusions and statements made in the Proposed Amended Order, after participating in the Committee Hearing on May 20, 2005, it is supportive of the findings and conclusions overall. However, this brief will set forth one very important disagreement with the Committee and request that the Commission include "LAND 1" as a condition for the demolition of the tank farm.

## **II. LAND USE**

Although the City does not have regulatory authority over the Power Plant, it does administer a lease for pipeline for discharging water, a pipeline for conveying oil to the tank farm, and cable and pipe for cathodic protection of the pipelines. The lease is subject to a 50-year agreement between the City of Morro Bay and Duke. The 50-year Agreement, which may not be extended or held over under the granting statutes, expired on November 14, 2004. (A copy of the Lease Agreement is attached hereto and was attached as Exhibit "B" to Exhibit 118: Prepared testimony of Rick Algert on behalf of Intervenor City of Morro Bay, dated December 11, 2001. Sponsored by Intervenor City; admitted into evidence on December 17, 2001.)

With the expiration of the lease in November 2004, City and Duke negotiated a new Lease Agreement that was approved and executed by the City Council for the City of Morro Bay on September 26, 2004. Instead of executing the agreement, Duke reneged on its previous

promises to the community and has refused to execute the lease agreement that was agreed upon by both the City and Duke.

With respect to Condition of Certifications for LAND USE, the City is adamant that **LAND-1** be added to the Conditions for Demolition. **LAND-1** states as follows:

**LAND-1** The project owner shall comply with the State requirements (Pub. Resources Code section 6701-6706) for the leasing of tide and submerged lands involving the Public Trust for Commerce, Navigation and Fisheries administered by the City of Morro Bay for the project's Outfall Area.

**Verification:** The project owner shall submit to the California Energy Commission's Compliance Project Manager (CPM) a copy of the final executed Outfall Lease Agreement that covers the City's administered property. **Said Lease Agreement shall be submitted prior to November 15, 2004** or prior to the start of "commercial operation," whichever occurs first.

Since the Lease between the City and Duke has expired, Duke is currently trespassing on the City's State Tide and Submerged Lands. Prior to the commencement of demolition, Duke must be required to secure a long-term lease with the City of Morro Bay for the use of the outfall pipeline for discharging water, the pipeline for conveying oil to the tank farm, and the cable and pipe for cathodic protection. (See written testimony of Rick Algert on behalf of the City of Morro Bay, Exhibit 118, admitted on December 17, 2001.) Mr. Algert's testimony (also found at pages 315-318 of the official transcript) is undisputed. Indeed, Mr. Trump, testifying on behalf of Duke, admitted: "We agree that we need to renew the Outfall easement which expires November 14, 2004" (transcript at 270:4-6), and that: "We agree that prior to commencement of construction, we will have to secure a long-term lease for the Outfall easement." (Transcript at

270:18-20.) Moreover, the granting statutes<sup>1</sup> specifically prohibit franchises (leases) in excess of 50 years. (See, e.g., Chapter 1076 of the Statutes of 1947, Section 1(a)).

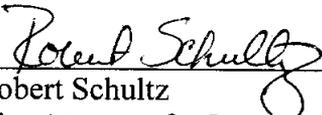
As the Commission is well aware, projects cannot be "Data Adequate" when site control or LORS conformity is lacking. Thus, Duke must obtain a new Lease Agreement from Morro Bay prior to the commencement of any phase of the project. Clearly, the Commission took into consideration the testimony and evidence and included as a condition of certification that Duke obtain a new lease prior to November 15, 2004 and this requirement must apply to any phase of the project that is approved by the Commission.

### III. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Commission include **Land 1** in the Presiding Member's Proposed Amended Order Authorizing Demolition of the Morro Bay Tank Farm.

Dated: June 14, 2005

Respectfully submitted,

  
\_\_\_\_\_  
Robert Schultz  
City Attorney for Intervener City of Morro Bay

---

<sup>1</sup> These include: Chapter 1076 of the Statutes of 1947, amended by Chapter 413 of the Statutes of 1955, Chapter 1874 of the Statutes of 1957 and Chapter 70 of the Statutes of 1960.

824<sup>25</sup> Value intake + discharge lines out of Morro Bay Steam Plant also refer to 1433-29  
2229-10-0051

**THIS AGREEMENT** made by and between **COUNTY OF SAN LUIS OBISPO**, a political subdivision of the State of California, hereinafter called **Lessor**, and **PACIFIC GAS AND ELECTRIC COMPANY**, a California corporation, hereinafter called **Lessee**,

**WITNESSETH** that

**WHEREAS** in connection with the construction and operation of Lessee's Morro Bay Steam Plant Lessee requires certain rights and easements in Lessor's lands for discharge water pipes, for oil pipe lines and for devices for eliminating electrolytic action, and Lessor is willing to let to Lessee such rights and easements in Lessor's said lands as may be required for the exercise of said rights and easements, and Lessor is authorized to make such lease under the Act of the Legislature hereinafter referred to; and

**WHEREAS** by two certain deeds, one dated November 19, 1951, and the other dated October 19, 1953, recorded respectively in the office of the County Recorder of the County of San Luis Obispo, State of California, in Book 641 at page 517, and Book 743 at page 408, of Official Records, Lessor granted to Lessee certain rights of way and easements for pipe lines or conduits for discharging water, and the parties hereto have since determined that a portion of said rights of way and easements lie within the lands situate in said County of San Luis Obispo conveyed to Lessor by the State of California by the Act of the Legislature set forth in Chapter 1076, Statutes of 1947, page 2479, and are therefore not subject to grant;

**NOW, THEREFORE** in consideration of the premises and of adequate value therefor, namely the conveyance in perpetuity by Lessee to Lessor of the real property hereinafter set forth, Lessor hereby lets to Lessee for the full term of fifty years, commencing with the date hereof, the following rights of way and easements, which Lessor has determined are for purposes consistent with the trusts under which Lessor holds said lands conveyed to Lessor by the State of California, in, over and across said last mentioned lands, to-wit:

1. A right of way and easement for the purpose of excavating for, installing, replacing (of the initial or any other size), maintaining

MAY 18 1955

and using pipe lines or conduits for discharging water, together with all necessary and appurtenant structures, in and on all of that certain parcel of land described as follows, to-wit:

Beginning at a point in the Line of Mean High Water as shown on a plat entitled "Map Showing Survey of San Luis Obispo County Property in Lot 1, Block 31, Atascadero Beach and Line of Mean High Water along the Pacific Ocean Adjacent to and North and South of said Property and near the Proposed Breakwater at Morro Rock. Surveyed by Kenneth Beck, County Surveyor, March 1934" and filed for record in the office of said County Recorder in Book 2 of Licensed Surveyors' Maps at page 39, from which the  $\frac{1}{2}$  inch iron pipe, marking the north-westerly terminus of the course in the boundary line of the 48.7 acre parcel of land described in the deed from Lessor to Lessee, dated September 17, 1951 and recorded in the office of said County Recorder in Book 628 of Official Records at page 342, which course has a bearing of north  $21^{\circ} 13'$  west and a length of 543.47 feet, bears north  $39^{\circ} 07'$  east 580.87 feet distant and running thence south  $26^{\circ} 23'$  east, along the Line of Mean High Water as shown upon said map, 200.58 feet; thence south  $59^{\circ} 12'$  west 1615.22 feet to a point marked "X" in rock on the original high water line at Morro Rock; thence along the original high water line at Morro Rock the following two courses and distances, namely: north  $60^{\circ} 28'$  west 151.55 feet to an iron rod; and thence north  $46^{\circ} 48'$  west 304.74 feet to a point marked "Y" in rock; thence leaving the original high water line at Morro Rock north  $38^{\circ} 43'$  east 197.26 feet; thence south  $51^{\circ} 48'$  east 314.55 feet; thence north  $59^{\circ} 12'$  east 1492.17 feet, more or less, to the point of beginning.

Power  
Plant  
Outfall

2. A right of way and easement for the purpose of excavating for, installing, replacing (of the initial or any other size), maintaining and using pipe lines for conveying oil, together with all necessary appliances and fittings for use in connection therewith, within the strip of land described as follows, to-wit:

A strip of land of the uniform width of 200 feet extending from the Line of Mean High Water as shown upon said map northwesterly to the westerly prolongation of the center line of 66th St., as said 66th St. is shown upon the map of Atascadero Beach Subdivision filed for record in the office of said County Recorder in Book 2 of Maps at page 15, and lying equally on each side of the line which begins at a point in the Line of Mean High Water as shown upon said map recorded in Book 2 of Licensed Surveyors' Maps at page 39, from which said  $\frac{1}{2}$  inch iron pipe bears south  $72^{\circ} 01'$  east 629.93 feet distant and runs thence north  $57^{\circ} 21'$  west 2580 feet, more or less, to a point in the westerly prolongation of the center line of said 66th St.

Marine  
Pipelines

3. A right of way and easement for the purpose of excavating for, installing, replacing (of the initial or any other size), maintaining and using cable and pipe or other metal for eliminating electrolytic action from Pacific's facilities on adjacent lands, together with all necessary and proper appliances and fixtures for use in connection therewith, within the strip of land described as follows, to-wit:

A strip of land of the uniform width of 20 feet extending northwesterly from the Line of Mean High Water as shown upon said map recorded in Book 2 of Licensed Surveyors' Maps at page 39, and lying equally on each side of the line which begins at a point in the Line of Mean High Water as shown upon said map recorded in Book 2 of Licensed Surveyors' Maps at page 39, from

Cathodic  
Protection

which said 1 1/2 inch iron pipe bears north 72° 29 1/2' east 534.91 feet distant and runs thence north 79° 53' west 520 feet.

As rental and consideration for said rights of way and easements for the full term hereof, Lessee has conveyed to Lessor by quitclaim deed that certain real property, situate in the County of San Luis Obispo, State of California, described as follows, to-wit:

*Vets Hall*

Beginning at the point of beginning of the description of the 48.7 acre parcel of land set forth in the quitclaim deed from County of San Luis Obispo to Pacific Gas and Electric Company, dated September 17, 1951 and recorded in the office of the County Recorder of said County of San Luis Obispo in Book 628 of Official Records at page 342, said point of beginning being the intersection of the northerly boundary line of Ninth St. with the center line of S St., as said streets are delineated and so designated upon that certain map of Atascadero Beach Subdivision filed for record in the office of said County Recorder in Book 2 of Maps at page 15, and running thence along the boundary line of said 48.7 acre parcel of land the following courses and distances, namely: south 89° 19' west, along the northerly boundary line of said Ninth St., 225.34 feet to the center line of Mesa Drive, as said Mesa Drive is delineated and so designated upon said map; and thence north 27° 06' west, along the center line of said Mesa Drive, 135.00 feet; thence leaving the boundary line of said 48.7 acre parcel of land north 88° 27' east 269.43 feet to the easterly boundary line of said 48.7 acre parcel of land, said easterly boundary line being the center line of said S St.; thence south 8° 00' east, along the last mentioned boundary line, 126 feet, more or less, to the point of beginning; containing 0.7 acre.



The parties hereto agree that said two deeds dated November 19, 1951, and October 19, 1953, respectively are inoperative so far as they may purport to grant rights in said lands conveyed to Lessor by the State of California, and in order to remove from the records of San Luis Obispo County any defect on Lessor's title to the last said lands by reason of said deeds, Lessee hereby quitclaims to Lessor any right, title and interest Lessee may have acquired in said last mentioned lands under and by virtue of said two deeds.

IN WITNESS WHEREOF the parties hereto have executed these presents in duplicate this 15 day of November, 1954.

Approved by  
EXECUTIVE COMMITTEE

FEB 15 1955

*[Signature]*  
Secretary

*[Signature]*

APPROVED

*[Signature]*  
348

V. P. IN CHARGE OF ELEC. OPER.

COUNTY OF SAN LUIS OBISPO

By *[Signature]*

Attest *[Signature]*  
County Clerk

PACIFIC GAS AND ELECTRIC COMPANY

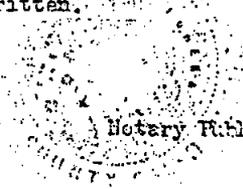
By *[Signature]*  
Its Vice-President and Assistant General Manager

And By *[Signature]*  
Its Secretary

STATE OF CALIFORNIA )  
County of San Luis Obispo ) ss.

On this 15th day of November, in the year 1954, before me W. T. Smith, a Notary Public in and for the said County of San Luis Obispo, residing therein, duly commissioned and sworn, personally appeared John Ruskovich, known to me to be the Chairman of the Board of Supervisors and A. E. Mallagh, known to me to be the County Clerk and Ex-officio Clerk of the Board of Supervisors of the County of San Luis Obispo that executed the within and foregoing instrument, and also known to me to be the persons who executed the said instrument on behalf of said County therein named, and acknowledged to me that such County executed the within instrument pursuant to a resolution of its Board of Supervisors.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of San Luis Obispo, the day and year in this certificate first above written.



*W. T. Smith*

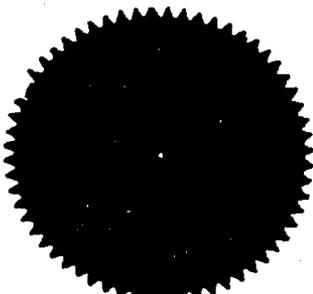
Notary Public in and for the County of San Luis Obispo, State of California.

STATE OF CALIFORNIA )  
City and County of San Francisco ) ss.

On this 16th day of February in the year One Thousand Nine Hundred and Fifty-five before me, MARIE H. STANLEY, a Notary Public, in and for the City and County of San Francisco, personally appeared

L. Harold Anderson and E. E. Manhard  
known to me to be the Vice President & Asst. Gen. Manager and Secre  
of the corporation described in and that executed the within instrument, and also known to me to be the person E who executed the within instruments on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this certificate first written.



*Marie H. Stanley*  
Notary Public in and for the City and County of San Francisco, State of California

**PROOF OF SERVICE BY MAIL**

STATE OF CALIFORNIA            }  
  }  
COUNTY OF SAN LUIS OBISPO }

I, the undersigned, declare that I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 years and not a party to the within action. My business address is 595 Harbor Street, Morro Bay, CA 93442.

On June 14, 2005, I served in the manner indicated below the foregoing documents, described as:

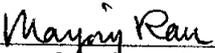
**CITY OF MORRO BAY'S WRITTEN COMMENTS  
RE: PRESIDING MEMBER'S PROPOSED  
AMENDED ORDER AUTHORIZING DEMOLITION  
OF MORRO BAY TANK FARM**

on the interested parties in this action by placing a true copy(ies) thereof in a sealed envelope(s) addressed to all parties on the attached service list.

I caused such envelope(s) to be deposited in the United States Mail at Morro Bay, California, with postage thereon fully prepaid. I am familiar with the City of Morro Bay's practice of collecting and processing correspondence for mailing. It is deposited with the United States postal service each day, and that practice was followed in the ordinary course of business for the service herein attested to. [CCP §1013(a)(3).]

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

Executed on June 14, 2005, at Morro Bay, California.

  
\_\_\_\_\_  
Marjory Rau

**SERVICE LIST  
00-AFC-12**

Duke Energy North America, LLC  
Kevin R. Johnson  
505 14<sup>th</sup> Street, Suite 940  
Oakland, CA 94612

Duke Energy North America, LLC  
Peter Okurowski  
505 14<sup>th</sup> Street, Suite 940  
Oakland, CA 94612

Christopher T. Ellison  
Ellison, Schneider & Harris LLP  
2015 H Street  
Sacramento, CA 95814-3109

Jane E. Luckhardt  
Downey, Brand, Seymour & Rohwer  
555 Capitol Mall, 10<sup>th</sup> Floor  
Sacramento, CA 95814

San Luis Obispo County APCD  
David Dixon, Engineering Manager  
3433 Roberto Court  
San Luis Obispo, CA 93401-7126

California Coastal Commission  
Tom Luster  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105

Roger Briggs, Executive Officer  
Regional Water Quality Control Board  
Central Coast Region  
81 Higuera Street, Suite 200  
San Luis Obispo, CA 93401-5427

Native American Heritage Commission  
Attention: Rob Wood  
915 Capitol Mall, Room 364  
Sacramento, CA 95814

Morro Bay Estuary Project  
Attention: Dan Berman  
601 Embarcadero, Suite 11  
Morro Bay, CA 93442

California State Parks  
Attention: Mike Walgren  
750 Hearst Castle Road  
San Simeon, CA 93452-9740

National Marine Fisheries Service  
Attention: Bryant Chesney  
501 West Oceana Blvd., Suite 4200  
Long Beach, CA 90802

California Department of Fish & Game  
Attention: George Isaac  
20 Lower Ragsdale Drive, Suite 100  
Monterey, CA 93940

Bonita Churney, Esq.  
Bryan Cave LLP  
PO Box 764  
Morro Bay, CA 93443

Mr. Babak Naficy  
Law Offices of Babak Naficy  
1204 Nipomo Street  
San Luis Obispo, CA 93401

Deborah A. Sivas, Director  
Earthjustice Environmental Law Clinic at Stanford  
553 Salvatierra Walk  
Stanford, CA 94305-8620

Patti Dunton  
Cultural Resources Director  
14650 Morro Road  
Atascadero, CA 93422

Barry C. Groveman and Steven J. Elie  
Musick, Peeler & Garrett  
One Wilshire Blvd., Suite 2000  
Los Angeles, CA 90017

The Coastal Alliance on Plant Expansion  
c/o Jack McCurdy & David Nelson  
PO Box 526  
Morro Bay, CA 93443

Caryn Holmes  
Staff Counsel  
California Energy Commission  
1516 Ninth Street – MS14  
Sacramento, CA 95814