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February 7, 2007

DOCKET 06-AFC-3
DATE <u>FEB 07 2007</u>
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VIA U.S. MAIL

Paul Fanfera, Senior Director
San Diego Unified Port District - Real Estate Division
P.O. Box 120488
San Diego, CA 92112-0488

Re: Clarification of Why the District May Not Approve A Lease-Option Agreement With LS Power Absent CEQA Review

Dear Mr. Fanfera:

On behalf of California Unions for Reliable Energy ("CURE"), this letter clarifies the District's legal obligations to conduct CEQA analyses before it takes action upon a proposed lease-option contract with LS Power for site control at the former LNG lands.

As an initial matter, we understand that the District is unlikely to take up the lease-option issue any time soon given recent concerns posed by elected officials, the public, and San Diego Gas & Electric's public statement that the company would not be purchasing generation from LS Power if LS Power constructs the project as currently proposed. Nevertheless, we felt it important to put to rest for the record the law on this matter.

In a recent letter to the District, LS Power asserted that "for power plants like the SBRP, [CEQA] review of potential environmental impacts, decisions regarding mitigation and the ultimate decision whether to permit the facility have been consolidated at the Energy Commission."¹ LS Power cited the CEQA Guideline which vests authority with the California Energy Commission to conduct CEQA analysis "relating to any thermal power plant site or facility ... for planning,

¹ Letter to Randa Coniglio, Port of San Diego, from Christopher T. Ellison, Ellison, Schneider & Harris for LS Power, at p.4 (January 17, 2007).

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engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water ...”² CURE does not dispute this principle. The Energy Commission holds exclusive authority “to certify all sites and related facilities in the state...”³

However, what LS Power fails to understand is that for all matters outside of certifying the construction and operation of a power plant (“planning, engineering or design”), such as land use decisions, those matters rest with the proper land use authority, which in this case is the District. The Energy Commission has no jurisdiction over such issues.⁴

We made this distinction clear in our January 2, 2007 letter: “it is incumbent upon the District to prepare a project-level CEQA document on the former LNG site before it grants the lease-option so that the public and decision makers have an opportunity to evaluate the proposed power plant within the coastal zone, **and evaluate whether a new power plant would be compatible with the other proposed residential, tourist, recreational and civic development for Chula Vista Bay contemplated in the District’s Bayfront Master Plan EIR.** For the District to wait until after LS Power has a 30-year lease would simply be too late because the District will have lost all flexibility at the site.”⁵

Not surprisingly, discussions of this precise nature are now occurring outside of the Energy Commission licensing proceeding for the power plant. On January 18, 2007, the District and the Chula Vista City Council held a public hearing to discuss the exact land use issues described in our January 2, 2007, letter. At that hearing, City Councilmember McCann asked whether placing a power plant on the former LNG lands was the highest and best use of the site given all of the other development proposed for Chula Vista Bay. Since that hearing, Mayor Cox and other council members have expressed their concern about the power plant, and the City Council has formed a subcommittee to expeditiously investigate these matters.

² CEQA Guidelines, § 15271.

³ Public Resources Code, § 25500.

⁴ As detailed in our January 2, 2007 letter, such decisions are nonetheless subject to CEQA.

⁵ Letter to Paul Fanfera, Port of San Diego, from Gloria D. Smith, Adams Broadwell Joseph & Cardozo, at p. 3 (January 2, 2007) (emphasis added).

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It is clear that the City of Chula Vista and the District intend to involve the community directly in this decision-making process. In our January 2, 2007 letter, we simply made the point that such a public process, including project-level CEQA review, must occur before the District enters into the lease-option contract.

Again, LS Power misapprehends the distinction between the District's land use authority and the Energy Commission's separate certification authority. In its January 17, 2007 letter, LS Power argues that every issue that surrounds its project is under the Energy Commission's exclusive purview and that, "there are no impacts from the power plant, much less the lease/option, that will occur without having been thoroughly reviewed and fully mitigated in full compliance with CEQA and all applicable laws ...the Port need not conduct any redundant environmental review of the lease-option." To be clear, CURE is not seeking redundant CEQA analysis. We are asking the District to initiate a public process, including project-level CEQA review, for its *land use* determination *before* the Energy Commission completes a costly year-long proceeding. To do otherwise risks LS Power obtaining a license for a site which does not meet the Port's land use objectives.

Sincerely,

Gloria D. Smith

GDS:bh

cc: California Energy Commission Service List

Docket No. 06-AFC-3 (via email)

cc: City of Chula Vista Community Dev. Dept. (via U.S. Mail)