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January 19, 2007

Mr. Bill Pfanner
Project Manager
Systems Assessment and Facility Siting Division
California Energy Commission
1516 9th Street, MS 15
Sacramento, CA 95814-5512

DOCKET
06-AFC-3
DATE JAN 19 2007
RECD. JAN 19 2007

Subject: LSP South Bay, LLC - South Bay Replacement Project AFC (06-AFC-3):
Docketing of January 17, 2007 Letter to the Port of San Diego regarding a Lease-
Option Agreement between the Port and LS Power Generation, LLC

Dear Mr. Pfanner:

On behalf of LSP South Bay, LLC, please find enclosed 12 copies and one original of copy of the January 17, 2007 letter from Ellison, Schneider & Harris L.L.P to the Port of San Diego, Real Estate Department regarding a Lease-Option Agreement between the Port of San Diego and LS Power Generation, LLC. For docketing purpose, also find attached the Proof of Service declaration.

We will coordinate this submittal with the Commission's Docket Unit.

LSP South Bay, LLC appreciates the continued opportunity to work with CEC staff on this important project.

Sincerely,
CH2M HILL

for Robert C. Mason
Project Director

Attachments

cc: Docket Unit - California Energy Commission
Kevin Johnson, LSP South Bay, LLC

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January 17, 2007

Ms. Randa Coniglio
Port of San Diego
Real Estate Department
P.O. Box 120488
San Diego, CA 92112-0488

Re: The San Diego Unified Port District May Approve a Lease-Option Agreement with LS Power Generation, LLC as such Approval is Exempt from Environmental Review Under the California Environmental Quality Act

Dear Ms. Coniglio:

On behalf of LS Power Generation, LLC ("LS Power"), this letter responds to the January 2, 2007, letter to the San Diego Unified Port District ("District" or "Port") from the California Unions for Reliable Energy ("CURE") asserting that the Port cannot approve a lease-option agreement with LS Power without completing project-level environmental review pursuant to the California Environmental Quality Act ("CEQA"). For the reasons discussed below, the CURE position is incorrect. The environmental review called for by CURE would duplicate and potentially conflict with the environmental review to be conducted by the California Energy Commission mandated for power plants under state law. That review will thoroughly review all potential adverse environmental impacts associated with the proposed power plant and the associated lease. It is more than appropriate that the Port defer to this review rather than conducting a duplicate review. Indeed, it is mandatory.

The only potential for any adverse environmental impacts from the lease/option agreement are those associated with the power plant that would be built on the leased property. Neither CURE nor anyone else asserts that the lease/option itself, as distinct from the power plant, has any potential impacts. Rather, CURE asserts that the Port has an obligation to study the potential impacts *of the power plant* because the lease/option constitutes a discretionary approval by the Port *of the power plant*.

However, the responsibility for preparing the environmental review of the power plant lies exclusively with the California Energy Commission. Pursuant to Public Resources Code

section 25519(c), the Energy Commission must be the lead agency charged with preparation of this environmental review. That law provides as follows:

The commission shall be the lead agency as provided in Section 21165 for all projects that require certification pursuant to this chapter and for projects that are exempted from such certification pursuant to Section 25541. Unless the commission's regulatory program governing site and facility certification and related proceedings are certified by the Resources Agency pursuant to Section 21080.5, an environmental impact report shall be completed within one year after receipt of the application. If the commission prepares a document or documents in the place of an environmental impact report or negative declaration under a regulatory program certified pursuant to Section 21080.5, any other public agency that must make a decision that is subject to the California Environmental Quality Act, Division 13 (commencing with Section 21000), on a site or related facility, shall use the document or documents prepared by the commission in the same manner as they would use an environmental impact report or negative declaration prepared by a lead agency. (Emphasis added.)

This law makes plain that if an environmental impact report were required prior to approval of the lease/option, the Port would be required to rely upon the documents prepared by the Energy Commission rather than conducting its own, duplicate review. Of course, that would create a significant timing problem—and potentially even a “chicken and egg” problem—because the approval of the lease option is an important step in the development process necessary to the Energy Commission’s review.

The legislature addressed that problem in another statute. Public Resources Code section 21080 categorically exempts discretionary decisions such as the Port’s lease approval from CEQA where the impacts will be covered in, among other things, a subsequent Energy Commission environmental review. That law provides:

[CEQA] does not apply to...Actions undertaken by a public agency relating to any thermal powerplant site or facility, including the expenditure, obligation, or encumbrance of funds by a public agency for planning, engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water (except groundwater), steam, or power for a thermal powerplant, if the powerplant site and related facility will be the subject of an environmental impact report, negative declaration, or other document, prepared pursuant to a regulatory program certified pursuant to Section 21080.5, which will be prepared by the State Energy Resources Conservation and Development Commission, by the Public Utilities Commission, or by the city or county in which the powerplant and related facility would be located if the environmental impact report, negative declaration, or

document includes the environmental impact, if any, of the action described in this paragraph. (Emphasis added)

Similarly, the CEQA Guidelines provide for statutory exemptions from CEQA. One such exemption perfectly describes the Port's approval of the lease-option for LS Power. According to Section 15271 of the CEQA Guidelines:

15271. Early Activities Related to Thermal Power Plants

(a) *CEQA does not apply to actions undertaken by a public agency relating to any thermal power plant site or facility including the expenditure, obligation, or encumbrance of funds by a public agency for planning, engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water (except groundwater), steam, or power for such a thermal power plant, if the thermal power plant site and related facility will be the subject of an EIR or Negative Declaration or other document or documents prepared pursuant to a regulatory program certified pursuant to Public Resources Code Section 21080.5, which will be prepared by:*

(1) The State Energy Resources Conservation and Development Commission,

...

(b) The EIR, Negative Declaration, or other document prepared for the thermal power plant site or facility, shall include the environmental impact, if any, of the early activities described in this section.

(c) This section acts to delay the timing of CEQA compliance from the early activities of a utility to the time when a regulatory agency is requested to approve the thermal power plant and shifts the responsibility for preparing the document to the regulatory agency. (Emphasis added)

It is beyond dispute that the Port's approval of the lease/option is an "action undertaken by a public agency relating to [a] thermal powerplant site or facility... [where] the powerplant site and related facility will be the subject of an environmental impact report, negative declaration, or other document prepared pursuant to a regulatory program certified pursuant to Section 21080.5 which will be prepared by the State Energy Resources Conservation and Development Commission..." Therefore, the Port's approval of the lease/option is categorically exempt from CEQA and no redundant environmental review is required of the Port. Nor must the Port wait to review the Energy Commission's documents before making its decision.¹

¹ Furthermore, according to the discussion of CEQA Guidelines Section 15271, the exemption "delays the CEQA compliance for thermal power plants for all utilities until the power plant needed approval from a regulatory agency." In other words, no CEQA compliance is required at the time of the Port's approval of the lease-option. The discussion of CEQA Guidelines Section 15271 explains the purpose of the exemption "as shifting both the timing and the responsibility for preparing the EIR." Therefore, the Port need not prepare the environmental analysis for approval of the lease-option, as such analysis will be conducted later by the CEC.

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Simply put, for power plants like the SBRP, the review of potential environmental impacts, decisions regarding mitigation and the ultimate decision whether to permit the facility have been consolidated at the Energy Commission. This is consistent with a fundamental purpose underlying the Commission's creation: to create an expert "one-stop" permitting entity for power plants that enforces and reconciles all applicable requirements and is responsible for the interest of the state as a whole.

In its letter, CURE describes the fact that Port approval of the lease-option will not enable the project to go forward. CURE states that "[o]nce the lease-option is granted, LS Power would be free to exercise the thirty-year lease *as soon as it meets several conditions that are outside of the Port's control, and the District finalizes its master plan.*"² By its own admission, CURE agrees that the later environmental review required of the CEC are necessary steps for approval of the South Bay Replacement Project. Thus, 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. Therefore, the view that environmental review of the lease-option is required of the Port is clearly erroneous. The Port need not conduct any redundant environmental review of the lease-option. Such duplicative review is exactly what the CEQA exemption is designed to avoid.³

For these reasons, LS Power disagrees with CURE's interpretation of the environmental review requirements under CEQA. Approval of the lease-option is subject to an express statutory exemption such that no environmental review by the Port is required—indeed, authorized—by law. This exemption recognizes that such review will be conducted and all impacts appropriately mitigated by the Energy Commission prior to any final approval of the project.

Respectfully Submitted,



Christopher T. Ellison

Jedediah G. Gibson

Ellison, Schneider & Harris, L.L.P.

² Id. (Emphasis added)

³ In addition, CEC practice when conducting environmental review is not to issue statements of overriding consideration, but instead to require complete mitigation of any impacts resulting from the project. Accordingly, the Port can expect there will be no significant, adverse environmental impacts from the SBRP as approved and conditioned by the Energy Commission.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE
STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION
FOR THE SOUTH BAY
REPLACEMENT PROJECT

Docket No. 06-AFC-3
PROOF OF SERVICE
(Revised 10/20/06)

INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:

DOCKET UNIT

Send the original signed document plus the required 12 copies to the address below:

**CALIFORNIA ENERGY COMMISSION
DOCKET UNIT, MS-4
Attn: Docket No. 99-AFC-8C
1516 Ninth Street
Sacramento, CA 95814-5512**

* * * *

In addition to the documents sent to the Commission Docket Unit, also send individual copies of any documents to:

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DECLARATION OF SERVICE

I, Jeannette Harris, declare that on January 19, 2007, I deposited copies of the attached Letter, RE: The San Diego Unified Port District May Approve a Lease-Option Agreement with LS Power Generation, LLC as such Approval is Exempt from Environmental Review Under the California Environmental Quality Act, in the United States mail at Sacramento, CA with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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


[signature]