

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

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In the Matter of:

The Application for Certification for the
CARLSBAD ENERGY CENTER
PROJECT

Docket No. 07-AFC-6

**RESPONSE IN SUPPORT OF MOTION FOR REVISED PSA and
PROJECT SCHEDULE RELIEF
BY CALIFORNIA UNIONS FOR RELIABLE ENERGY**

January 27, 2009

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STATE OF CALIFORNIA

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On behalf of intervenor California Unions for Reliable Energy (“CURE”), we write in strong support of intervenor City of Carlsbad’s January 20, 2009, motion for a revised preliminary staff assessment (“PSA”) and relief from the current project schedule.

1. Potentially Significant Impacts Associated with the I-5 Widening Project Must Be Analyzed in a Revised PSA

The City’s motion is based on the Caltrans I-5 widening project and the justified concern that it, and the public, have not been fully informed regarding the impacts the I-5 widening project may pose to the CECP. We share the City’s concern. As we understand it, the widening project would add 4 high-occupancy lanes in Northern San Diego County, a stretch of I-5 that includes Carlsbad. More specifically, we learned from staff and others in attendance at the January 7-8 PSA workshop that the widening project has

the potential to significantly affect the CECP as described in the AFC and the subsequent project enhancement and refinement document, the AFC amendments.

The evidence in the record thus far indicates that each of the projects has the potential to pose significant impacts upon the other. Specifically, once the widening is complete, speeding cars and trucks will travel in unusually close and potentially unsafe proximity to the power plant. These potentially significant safety issues have not been analyzed and disclosed in the PSA. Similarly, the I-5 expansion project has the potential to pose significant visual impacts as mitigation for the safety problems, matters omitted from the PSA. The significant cumulative impacts posed by the two projects must be analyzed in a revised PSA.

If the two projects continue to progress on separate tracks absent any consideration of the other, as the first approving agency, the Energy Commission runs the risk of approving a project that may ultimately be incompatible with Caltrans' requirements. Such conflicts could precipitate a costly and time-consuming post-certification amendment proceeding. As a matter of good government, the two state agencies must coordinate the projects now, before any irretrievable commitments of resources have been made.

CURE supports the City's request that Commission staff revise the PSA in order to analyze the potentially significant safety and visual resource impacts disclosed during the January PSA workshop.

2. CEQA Requires that the Commission Provide the Public with a Complete Air Quality Analysis in a Revised PSA

In addition to the undisclosed impacts associated with the I-5 widening project, a revised and recirculated PSA will be necessary once air quality staff completes its review. During the January PSA workshop, it was apparent that staff had not received all of the information it needed from NRG to complete its review. Moreover, staff was clear that, based on NRG's comments on the PDOC, NRG had not been fully forthcoming with Commission staff in its air quality analyses in the AFC. According to staff, several key aspects of the CECP were omitted, requiring additional data requests of NRG before Commission staff could complete its air quality analysis pursuant to CEQA. For example, it remains unclear whether NRG is proposing one project with two turbines or two projects with one turbine each. These questions are not academic as they bear upon boiler decommissioning and NRG's obtaining and surrendering legal emission reductions credits in a timely manner under both the Clean Air Act and CEQA.

Frankly, as of this writing, we are not certain whether staff has informally obtained the outstanding information, or whether it will be making additional data requests. In either case, members of the public have

not been afforded the opportunity to review and comment upon a complete CEQA analysis on the CECP's air quality impacts.

It is incumbent on the Committee to ensure that the City and the public are afforded the fullest opportunity to review and comment upon staff's draft air quality analysis once it is complete.

3. The PSA Must Include a Statutorily-Mandated Coastal Act Compliance Report

The California Coastal Act unequivocally requires that the Coastal Commission prepare an in-depth report for all thermal power plant projects proposed within a coastal zone.¹ Unfortunately, due to budgetary constraints, the Coastal Commission is unable to participate in the CECP proceeding at this time. Given that the Coastal Commission's organic act is clear that its participation is mandatory, there is a strong legal argument

¹ The Coastal Commission's report shall contain a consideration of, and findings regarding, all of the following:

- (1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.
- (2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.
- (3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.
- (4) The potential adverse environmental effects on fish and wildlife and their habitats.
- (5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.
- (6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.
- (7) Such other matters as the commission deems appropriate and necessary to carry out this division. (Public Resources Code § 30413(d).)

that the Energy Commission cannot proceed absent Coastal Commission's participation.

However, Commission staff has taken the position that it is fully equipped to prepare such a report itself absent the Coastal Commission's expertise. Indeed, at the January PSA workshop, staff adopted the position that the PSA's Coastal Act Consistency Determination meets the Coastal Act's legal requirements. As untenable as that position may be, what is worse is the practical fact that the PSA's brief discussion concerning the CECP's location in a coastal zone utterly fails as a surrogate for a Coastal Commission-prepared report pursuant to Coastal Act section 30413(d). In reality, the PSA made no attempt to address all of the enumerated requirements in the statute. Instead, it refers the reader to numerous other PSA sections so that it is impossible to discern whether the CECP is coastal dependent or complies with the Coastal Act. A stand-alone analysis is required with all mandatory sections in one place.

Substantively, the PSA takes the position that numerous aspects of the CECP render it coastal dependent. However, at the PSA workshop, it became clear that only the ocean water purification component of the CECP may be coastal dependent. Also, at the workshop, it became clear that a thermal power plant is not a coastal dependent use per se. These issues must be revised and recirculated in a legally defensible Coastal Act report.

In short, if the Commission adopts the shaky legal position that the Energy Commission may step into the shoes of the Coastal Commission for purposes of evaluating Coastal Act compliance for projects proposed within the coastal zone, it must fulfill the legal requirements of the Coastal Act to the letter.

4. A PSA is the Legal Equivalent of a Draft EIR

As became very apparent during the January PSA workshop, many essential components of the PSA are missing. For example, staff acknowledged that further analysis was necessary for the Soil and Water Resources section given that a back-up supply of water has yet to be identified and analyzed. At the workshop, the City's fire chief raised important safety issues associated with the CECP's unique and difficult to reach location. These concerns reach into several discrete resources areas and must be addressed in a revised PSA. Finally, intervenors just received NRG's responses to the Center for Biological Diversity's data requests concerning the CECP's greenhouse gas emissions on January 26, 2009.

In sum, the I-5 widening project, air quality, Coastal Act compliance, safety and GHG emissions are a few examples of resource areas not adequately analyzed in the PSA. These deficiencies in turn prevent meaningful public review and comment, rendering the PSA unacceptable as a draft CEQA document.

Under well-established CEQA principles, if a draft environmental impact report lacks basic and essential components as set forth in the CEQA Guideline, then, by definition, public review has been precluded. According to the Guidelines:

A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term “information” can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not “significant” unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement.²

If the Commission declines to issue a revised PSA for public review and simply proceeds to the FSA stage, it would run afoul of CEQA’s informational requirements.³ A final staff assessment is staff’s final report to the Committee and serves as its testimony in the evidentiary hearings. While the Commission may conduct an additional workshop in response to an FSA, the substantive work is complete. For this reason, the only way the Commission can cure the substantive and procedural defects described above is to recirculate the PSA for full public review and comment.⁴

² Guidelines section 15088.5.

³ The Commission recently acknowledged that a PSA is the functional equivalent of a DEIR, and a FSA is the functional equivalent of a FEIR. See Informational Hearing Before the California Energy Resources Conservation and Development Commission in the Matter of Mirant Marsh Landing (08-AFC-3).

⁴ *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 96.

CURE urges the Commission to grant the City's motion.

Dated: January 27, 2009

Respectfully submitted,



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PROOF OF SERVICE

I, Bonnie Heeley, declare that on January 27, 2009, transmission of the RESPONSE IN SUPPORT OF MOTION FOR REVISED PSA and PROJECT SCHEDULE RELIEF BY CLAIFORNIA UNIONS FOR RELIABLE ENERGY via electronic mail was consistent with the requirements of California Code of Regulation, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list below:

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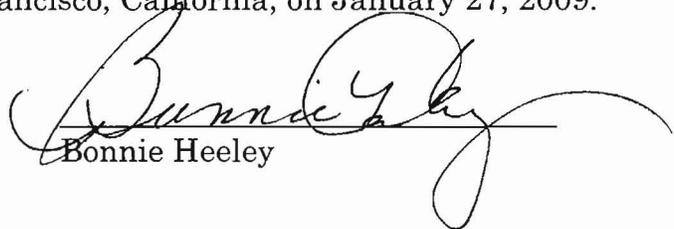
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I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, California, on January 27, 2009.


Bonnie Heeley

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January 27, 2009

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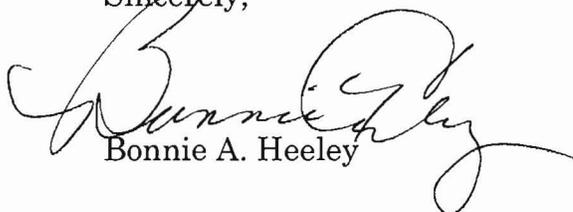
Re: Docket No. 07-AFC-6; Carlsbad Energy Center Project

Dear Docket Office Clerk:

Enclosed are an original and two copies of Response in Support of Motion for Revised PSA and Project Schedule Relief by California Unions for Reliable Energy. This document was previously emailed to the Docket Office.

Please process the document and return a conformed copy in the envelope provided. Thank you for your assistance

Sincerely,



Bonnie A. Heeley

:bh
Enclosures

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