

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

CARLSBAD ENERGY CENTER LLC'S OPPOSITION TO  
CITY OF CARLSBAD'S MOTION FOR  
A REVISED STAFF PSA AND PROJECT SCHEDULE RELIEF

January 30, 2009

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**STATE OF CALIFORNIA**

**Energy Resources Conservation  
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A REVISED STAFF PSA AND PROJECT SCHEDULE RELIEF**

Carlsbad Energy Center LLC ("Applicant") herein opposes the City of Carlsbad's ("City") Motion for a Revised Staff PSA and Project Schedule Relief ("Motion") filed with the California Energy Commission ("Energy Commission") on January 20, 2009.<sup>1</sup>

**I. INTRODUCTION**

The Carlsbad Energy Center project ("CECP") Application for Certification ("AFC") was deemed data adequate by Staff more than one year ago, on October 31, 2007. The City's Motion to delay and extend the CEC AFC process beyond the CECP Siting Committee's current Scheduling Order thus comes fifteen months into the prescribed twelve-month AFC review

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<sup>1</sup> Applicant's Opposition also constitutes its opposition to Intervenor Power of Vision's Request for Revised Preliminary Staff Assessment, filed on January 22, 2009 in support of the City's Motion, and Intervenor California Unions for Reliable Energy's ("CURE") Response in Support of Motion for Revised PSA and Project Schedule Relief, filed on January 27, 2009. Applicant reserves the right to file further responses to Power of Vision and CURE's arguments.

process.<sup>2</sup> The delayed progress of the AFC is hindering CECP's ability to come online and meet the San Diego region's critical need for new, clean, highly efficient, and air cooled power generating resources that will replace aging once-through cooled generating units and will provide backup for intermittent renewable resources. While CECP is designed to provide long-term electrical resource solutions for the region, a substantial benefit of the project is that it also would come online during the short-term critical need period within the years 2010 and 2012, as determined by San Diego Gas and Electric ("SDG&E") and the California Public Utilities Commission.<sup>3</sup> This short-term need has become even more critical due to the delays to other regional resources including transmission projects and peaking generation projects. A further delay of the AFC will prevent timely delivery of CECP within this critical need period.

The Motion is premised on the City's unsubstantiated opinion that further analysis is needed on the potential cumulative impact of CECP and California Department of Transportation's ("Caltrans") plans to widen Interstate 5 ("I-5") in the vicinity of the CECP site. Further, the City's arguments rest on several flawed assumptions. First, the City assumes that a revised Preliminary Staff Assessment ("PSA") is necessary to provide a rigorous review of CECP and to ensure that Staff properly assesses the project under the AFC process. Second, the City assumes there is additional information available regarding the I-5 widening project that could alter Staff's cumulative impacts analysis. Third, the alleged need for a revised PSA is based on the City's conclusion that there are "almost-certain unavoidable adverse visual

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<sup>2</sup> Various Committee Orders regarding CECP have repeatedly documented CECP's delayed progress toward a timely Final Staff Assessment. (*See, e.g.*, Dec. 26, 2008 and Nov. 12, 2008 Revised Committee Scheduling Orders; Oct. 14, 2008 Committee Order re Status Reports.)

<sup>3</sup> As demonstrated in the California Public Utility Commission's November 6, 2008 Decision No. 08-11-008 authorizing SDG&E to procure 530 megawatts of new local capacity and also SDG&E's March 9, 2007 Request for Offers for new resources with online dates during 2010-2012.

cumulative impacts resulting from the construction of the [CECP] and a Caltrans project.”

(Motion, p.1.) The City’s arguments fail because its assumptions fail.

Perhaps most important, neither Staff, Caltrans, nor the Applicant have concluded that the I-5 widening will have an unavoidable significant impact on CECP. The City has had, and will continue to have, ample opportunity to present its differing opinions throughout the CECP AFC process. Differing opinions do not constitute reasonable or even legitimate grounds for the Committee to order Staff to reissue the PSA nor for the Committee to delay the proceeding.

Staff provided a thorough analysis of the potential impacts associated with CECP in the PSA. There is no new information or data that would necessitate a revision of the PSA. Yet, even if there was, the Final Staff Assessment (“FSA”) would, as it should, accommodate that revised testimony by Staff. In addition, the public and all parties have had the opportunity to over the past 50 days to provide comments on the PSA and will receive further opportunities to comment on the Staff’s work product. Moreover, Staff will provide additional forums for comment on CECP in the coming months, including Staff’s commitment to hold a voluntary FSA workshop following release of the FSA. Finally, and most important, the City and all other parties will be able to present their arguments and evidence to the Committee through the evidentiary hearing process, which will follow the Staff assessment phase of this proceeding. There is no reason for the Committee to order Staff to revise the PSA, or for the Committee to further delay the CECP AFC schedule.

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## II. ARGUMENT

### A. A Revised PSA is Unwarranted and Unjustified

#### 1. A Revised PSA Would Defeat the Very Purpose of the Issuance of a Preliminary Staff Assessment Before the Final Staff Assessment.

In considering the City's Motion, it is important to consider the regulatory framework of the CEC AFC process. The Energy Commission's process has been certified as the functional equivalent of review under the California Environmental Quality Act ("CEQA"). (Pub. Res. Code §§ 21080.5; 25519(c); 14 Cal. Code Regs. §§ 15250, 15251(j).) Staff responsibilities with regard to environmental review of an AFC are outlined in detail in the Energy Commission regulations:

The staff shall review the information provided by the applicant and other sources and assess the environmental effects of the applicant's proposal, the completeness of the applicant's proposed mitigation measures, and the need for, and feasibility of, additional or alternative mitigation measures.

(20 Cal. Code Regs. § 1742.5(a).) Staff presents the results of its environmental assessment in a report, the Final Staff Assessment, which is offered as evidence at the Committee's hearings on the AFC pursuant to section 1748 of the Energy Commission regulations. (20 Cal. Code Regs. §§ 1742.5(b), 1747.) The FSA must be published and distributed to interested parties and agencies at least fourteen days before the start of the Committee hearings. (20 Cal. Code Regs. § 1747.) The FSA is written to inform both interested persons and the Committee on the environmental consequences of the AFC, and to assist the Presiding Member of the Committee in preparing the Presiding Member's Proposed Decision ("PMPD"). (20 Cal. Code Regs. § 1742.5(c).) While the Energy Commission regulations specifically provide for a thirty-day comment period after the publication of the PMPD (20 Cal. Code Regs. § 1749(b)), the

regulations do not provide for a similar comment period after the issuance of the FSA given that the FSA is only required to be published two weeks prior to evidentiary hearings.

Thus, under Energy Commission regulations, Staff is not required to publish a PSA, much less a revised PSA, prior to providing its FSA to the Committee and interested parties. To ensure its testimony to the Committee on an AFC has been thoroughly vetted and revised as appropriate, however, Staff generally publishes both a PSA and an FSA. In this manner, Staff goes above and beyond the requirements of the Energy Commission statutes and regulations.

As there is no additional analysis that could be conducted regarding the cumulative impacts of CECP at this time, there would be no benefit or logic in directing Staff to release a revised PSA for CECP based on the I-5 project, particularly because Staff's issuance of the PSA, along with the PSA workshop and consideration of comments to the PSA, already goes beyond the regulatory requirements. Even in circumstances where additional analysis is possible, the FSA readily accommodates it.<sup>4</sup> Staff should finalize its analysis according to standard protocol and issue such analysis in the FSA pursuant to 20 Cal. Code Regs. section 1747.

**2. The Public, Intervenors, and Other Interested Persons Have Had Ample Opportunity to Comment on the Cumulative Impacts of CECP.**

Applicant agrees that input from the public, interested agencies, and other parties is a necessary and invaluable component of the AFC process. The City has been actively involved in the CECP proceeding since the beginning. As the City notes in its Motion, the City submitted

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<sup>4</sup> For the same reasons, a revised PSA is not necessary to address Staff's request for clarification on air quality issues, as CURE has argued in its Response in support of the City's Motion. Any revision that may be necessary to Staff's air quality analysis is properly presented in a FSA. Similarly, any other comments or questions on the PSA, such as fire and safety issues, the adequacy of the Applicant's evaluation of CECP greenhouse gas emissions, or compliance with the Coastal Act, should be addressed by Staff in the FSA. A revised PSA is not necessary simply because a party disagrees with any of the conclusions in the PSA or takes issue with Staff's analysis.

information to Staff on the I-5 widening as far back as October 2007. The City also commented on the potential cumulative impact of the I-5 widening on CECP at the January 7 and 8, 2009 PSA workshop. The City also has the opportunity to submit comments on the PSA on or before January 30, 2009, including its differing opinions on the cumulative impact of the Caltrans project and CECP. In addition, the City has issued numerous data requests to Applicant, and, as an intervenor, the City will have the opportunity to offer testimony or other evidence as well as examine witnesses at the CEC evidentiary hearings on CECP. (20 Cal. Code Regs. § 1712.) The City has not been deprived, nor will it be deprived during the remainder of the CECP AFC proceeding, of any opportunity to provide information or its opinion to the Committee and Staff regarding CECP.

The public also has had ample opportunity to comment on CECP. Staff has held three public workshops<sup>5</sup> in Carlsbad regarding CECP, totaling dozens of hours of discussion among Staff, Applicant, the City, other intervenors, and members of the community. On December 17, 2007, Applicant led City officials, Staff, and members of the public on a tour of the proposed CECP site in conjunction with an informational discussion about the project. Applicant also has participated in numerous meetings with City officials to work on the myriad issues the City has raised regarding CECP. Applicant has also provided additional opportunity for public involvement at voluntary public meetings it has conducted separate from the AFC process, including two open house meetings held on June 17, 2008, and August 28, 2008. Moreover, Staff responded to questions and comments at the public workshops, and also addressed public comments in writing in the PSA. (*See, e.g.*, Staff's response to comments on visual resources, PSA, p.4.12-31 – 4.12.33.) In fact, the PSA was issued on December 11, 2008, almost fourteen

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<sup>5</sup> The three workshops were held on January 24, 2008, March 26, 2008, and January 7-8, 2009.

months after the CECP AFC was deemed data adequate, allowing ample time for public involvement prior to its publication. The public, the City, and other interested parties have not been denied the right or opportunity to comment on CECP and the potential cumulative impact of the Caltrans I-5 project. Consequently, the City's argument that a revised PSA or delayed schedule would provide the City with "the opportunity to be fully heard on the issues" lacks merit and is not based in fact.

**3. A Revised PSA Would Contribute Nothing to the Cumulative Impact Analysis of CECP.**

Applicant and Staff have presented as thorough an analysis of CECP's cumulative impacts as possible, given the information presently available. Under CEQA, Applicant and the CEC, as the lead agency for environmental review of CECP, must consider "past, present, and probable future projects producing related or cumulative impacts." (14 Cal. Code Regs. § 15130(b)(1)(A).) Arguably, the Carlsbad-area I-5 widening could be considered a project currently under review since Caltrans issued a notice of preparation ("NOP") for the entire regional plan to widen I-5. As a project under review, the Carlsbad area I-5 widening would then be considered a "probable future project" under CEQA Guidelines section 15130. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 75 ("projects that are under review are 'reasonably foreseeable probable future projects'").) Caltrans, however, is considering several potential alignments for widening I-5 adjacent to the CECP site and has not chosen a preferred alignment nor even issued a draft environmental impact report. While Caltrans published the NOP of an environmental impact report ("EIR") for the North Coast Interstate 5 Corridor project in 2004, and several segments of the project have been completed, to date Caltrans has not completed any formal documents nor proceeded further with widening in the area of CECP.

Additional analysis of the cumulative effects associated with CECP is not feasible at present given that Caltrans has not finalized its plans for widening I-5 in the vicinity of the CECP site. Drafting an environmental review document under CEQA necessarily involves some forecasting, but, nevertheless, Applicant “must use its best efforts to find out and disclose all it reasonably can.” (14 Cal. Code Regs. § 15144.) “[A] good-faith and reasonable disclosure of cumulative impacts is sufficient.” (*Fairview Neighbors v. County of Ventura* (1985) 70 Cal.App.4th 238, 245.) Applicant has included all available information on the I-5 widening in its analysis of CECP’s potential visual impacts. (Data Responses, Set 2, Visual Resources #105, p.32 (March 19, 2008).) Applicant cannot, however, predict whether Caltrans will choose to attempt to condemn Applicant’s property and remove the existing earthen berm to align I-5 to the west of its current path, nor can Applicant or Staff predict which alignment Caltrans will determine is the preferred alignment for the widening project.

Caltrans’ project and its precise impact on CECP remain too speculative to allow for any further analysis. If, after thorough investigation, Applicant finds that “a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact.” (14 Cal. Code Regs. § 15145.) Applicant has complied with CEQA in analyzing the cumulative impacts associated with CECP. Likewise, Staff has presented its own analysis of the cumulative impacts of CECP in the PSA.

Staff analyzed the cumulative impact of the I-5 widening in the PSA, fully acknowledging the potential for a significant adverse cumulative impact, if left unmitigated. (PSA, p.4.12-26 – 4.12-27.) Staff concluded that “Caltrans should plan and properly mitigate for the I-5 widening,” including “fully investigating additional I-5 widening alternatives, and implementing appropriate mitigation to the extent feasible.” (PSA, p.4.12-27.) Public comments

to Staff included a request for a visual simulation of CECP with a future widened I-5, but Staff responded that it “believes that further clarification about the I-5 project is needed prior to” requesting such a simulation. (PSA, p.4.12-32.)

The City states that it believes further information and analysis on the impacts of the I-5 widening will lead “to a determination by Staff of significant unavoidable impacts.” (Motion p.1.) If additional information were to become available, Staff may or may not reach a different conclusion on the cumulative impacts associated with CECP. The City’s opinion on the conclusions Staff should reach regarding CECP has no bearing on the validity of Staff’s evaluation in the PSA.

**B. A Delay in the CECP Schedule is Unnecessary**

The City’s call to delay the issuance of the FSA appears calculated to distract Staff from its duty to consider Applicant’s proposed project and present a thorough analysis of the reasonably foreseeable cumulative impacts associated with the project in a timely fashion. (Pub. Res. Code § 25540.6(a)(1) (requiring the Commission to issue a final decision on an AFC for a natural gas-fired power plant within twelve months of the filing of the AFC).) Additional time will not afford the public or the City with an opportunity to comment on CECP that it has not already had. Nor would additional time enable Staff to conjure up a more definitive analysis of a Caltrans project that is still in the planning stages. The Committee is not skirting a proper analysis of any known or reasonably foreseeable environmental impact by directing Staff to proceed with its processing of the CECP AFC.

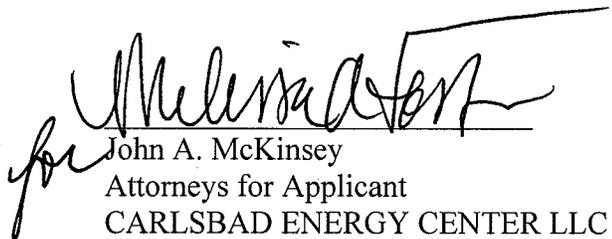
**III. CONCLUSION**

Given the lack of information available on Caltrans’ preferred alignment for the I-5 widening near the CECP site, Staff’s PSA analysis on the cumulative impacts associated with

CECP is complete. A revised PSA would thus serve no purpose. Any additional information that becomes available should be presented and analyzed in the Staff FSA. The City's request for a delay in the CECP schedule to allow for a revised PSA and associated public comment period is, therefore, completely unjustified. For these reasons, Applicant respectfully requests that the Committee deny the City's Motion in its entirety.

Date: January 30, 2009

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APPLICATION FOR CERTIFICATION  
FOR THE CARLSBAD ENERGY  
CENTER PROJECT

Docket No. 07-FAC-6  
PROOF OF SERVICE  
(Revised 1/12/2009)

**Applicant's Opposition to City of Carlsbad's Motion for a Revised Staff PSA and  
Project Schedule Relief**

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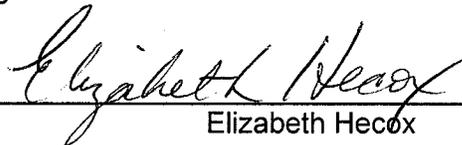
**DECLARATION OF SERVICE**

I, Elizabeth Hecox, declare that on January 30, 2009, I deposited copies of the aforementioned document in the United State mail at 980 Ninth Street, Suite 1900, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

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

  
\_\_\_\_\_  
Elizabeth Hecox