BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION (AFC) FOR THE
CARLSBAD ENERGY CENTER PROJECT

DOCKET NO. 07-AFC-6

DOCKET
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DATE 9/15/2009
RECD. 9/15/2009

COMMITTEE RULING ON INTERVENOR POWER OF VISION'S PETITION TO COMPEL DATA RESPONSES

On May 27, 2009, Intervenor Power of Vision (POV) issued a Data Request to Carlsbad Energy Center, LLC (Applicant). On June 19, 2009, the Applicant objected to the Data Request. POV responded on June 29, 2009, by filing a *Petition to Compel Response to Data Requests* (Petition) for the Data Request. Following response from the Applicant, the Carlsbad AFC Committee adopts the following rulings on the Petition.

The Petition comes before us prior to the presentation of any evidence. Nothing in these rulings is intended to comment on the merits of the Application for Certification (AFC) or the legal and procedural issues involved in our review, such as the scope of the environmental impact analysis of air quality impacts. Those issues will be discussed and decided during the evidentiary hearings.

POV's Data Request is stated as follows:

> "Because of the anomalies indicated above in the Applicant's reported data, and in order to determine whether other data reported by the Applicant as far back as the year 2002, including that reported for emissions, are accurate, Power of Vision (POV) hereby requests that the original documents wherein the Applicant records hourly data on Encina Power Station units 1 through 5 relating to times of operation, fuel consumption, and NO_x emissions be made available for inspection and possible copying by POV and other parties to this application. Since such original records may be voluminous, we suggest such inspection be made at the plant site where the records originated."

The anomalies POV refers to are apparent differences between operations and emissions data reported in January 2009, in response to Center for Biological Diversity data requests and that reported in an April 2009 report to the San Diego Air Pollution Control District. The April report shows total operating hours for Encina Units 1 through 3 for the years 2007 and 2008 of 590 hours greater than the January data, an 8.5 percent increase. POV asserts that some of the data leads to a conclusion that the

units at times in 2007 and 2008 operated for more than 24 hours per day, an impossibility.

To determine whether to grant the Petition, we apply the following criteria, previously applied in this matter to discovery petitions by Intervenors Center for Biological Diversity and the City of Carlsbad:

- The relevance of the information.
- Is the information available to the Applicant or from some other source, or has it already been provided in some form?
- Is the request for data, analysis, or research?
- The burden on the Applicant to provide the data.
- The timeliness of the request.

1. Relevance

According to the Preliminary Staff Assessment and the SDAPCD's Final Determination of Compliance, Units 1 through 3 will be permanently shut down when the proposed project begins operation. Emission offsets for the proposed project will, at least in part, consist of credits created by the shutdown of Units 1 through 3. Those credits may also be used as mitigation under CEQA. The amount of credit is based upon the actual hours of operation of the units over the recent past rather than the maximum permitted number of hours they could be operated. Therefore, the actual operating history of Units 1 through 3 may be relevant in this proceeding. The relevance of the operating history for units 4 and 5 is less clear, however, as they will remain in operation and are not a proposed source of emission credits.

The Applicant argues that POV should be satisfied with its summary of the data, contained in the January 2009 data response and in other publicly available reports as well as its explanation for the discrepancies POV identified. Parties are not required to accept the factual assertions of other parties at face value, however. If they choose, they can test the assertions against the raw data, no less so here where discrepancies may exist.

2. Availability

We note that in addition to the data summaries that POV identifies as conflicting, the Applicant recently provided the parties, including POV, data from the continuous emissions monitoring system (CEMS) covering most of the requested period. (See the August 24, 2009, letter from Tom W. Andrews of Sierra Research to Shaheerah Kelly of the U.S. Environmental Protection Agency and attachments; these documents were served on the parties on August 25, 2009.) That most recently provided data does not include daily data for 2002 or varying portions of 2003, and does not include fuel consumption, however, and is therefore not fully responsive to the request, which seeks

hourly data. The best and perhaps only source for the additional information appears to be the Applicant's records.

3. Data, Analysis, or Research

POV's request is only to review existing data—the logs from which the Applicant's operating hour summaries were derived. It is not requesting that the Applicant analyze or synthesize the data in any way.

4. Burden on the Party Producing the Data

The Applicant asserts that providing the data would be unduly burdensome because

> "the documents [POV] seeks to inspect are not assembled for such ready inspection. Rather, the documents and their underlying data are relied upon by Applicant's consultants when preparing specific reports required by the SDAPCD. To make these documents available would take significant time, resources, and personnel, and in the end, would not result in valuable data or information relevant to CECP's AFC proceeding. Summaries of the raw data that POV seeks to inspect are routinely provided as reports to the SDAPCD in compliance with EPS permit conditions, SDAPCD Rules, and the Clean Air Act. POV would not discover in the raw data any information that is not presented in Applicant's air emissions reports, which are public documents."

We are unconvinced by the Applicant's assertion. Having assembled the documents at least once for use by its consultants (and again, at least in part, for US EPA), it should be able to reassemble them without great difficulty, especially the electronically stored data. Burden to the producing party is not measured by the potential value or relevance of the information to the requesting party.

5. Timeliness of the Data Request

Not only must a data request seek satisfy the above requirements; it must be made in a timely manner. Our regulations provide:

> All requests for information shall be submitted no later than 180 days from the date the commission determines an application is complete, unless the Committee allows requests for information at a later time for good cause shown. [Cal. Code Regs., tit. 20, § 1716(e).]

The AFC was data adequate on October 31, 2007; the 180-day permissive data request window closed on April 28, 2008, more than a year before POV made its data requests.[1] We must therefore determine whether POV has shown good cause for the late-filed requests.

[1] POV did not Petition to Intervene in this matter until on October 14, 2008, over 3 months following the 180-day deadline. In granting the Petition on November 12, 2008, we said "[t]he deadlines for conducting discovery and other matters shall not be extended by the granting of this Petition."

The Applicant's intention to derive emissions credits from the retirement of Units 1 through 3 was first disclosed in the AFC (see AFC, pp. 5.1-60 to 5.1-61) and reiterated at the Informational Hearing held in December, 2007 (12/17/07 RT 43). A wide ranging hunt for further undiscovered discrepancies in the emissions data is not appropriate at this late stage in this proceeding. Staff is about to publish its Final Staff Assessment and the parties must begin to identify, and mark their exhibits, finalize their testimony, and prepare for the evidentiary hearings.

In its August 24 letter to the US EPA, the Applicant indicates that data from the CEMS systems installed in 2003 is available in an electronic format but data from the older CEMS were not so available. US EPA was provided with daily totals and averages for 2003 through 2008. Those totals and averages presumably were calculated from data from the CEMS that is also kept electronically on an hourly or even shorter basis. At little cost or inconvenience, that data could be provided to allow POV to test the previously provided summaries and the explanations Applicant has offered for the identified discrepancies.

We believe the production of the electronic data generated by the CEMS strikes the proper balance between seeking the truth regarding the discrepancies in previously provided data and our limitations on discovery designed to provide for the orderly review and decision of AFCs.

IT IS THEREFORE ORDERED that the Petition is **GRANTED, in part**. The Applicant shall provide the electronically generated data from the CEMS for Units 1 through 3 for 2003 through 2008. The data may be provided, if available, at a frequency of no more than hourly intervals or may be provided in the raw form that the CEMS systems output.

Dated September 15, 2009, at Sacramento, California.

JAMES D. BOYD
Vice Chair and Presiding Member
Carlsbad AFC Committee

KAREN DOUGLAS
Chairman and Associate Member
Carlsbad AFC Committee

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APPLICATION FOR CERTIFICATION FOR THE *CARLSBAD ENERGY CENTER PROJECT*

Docket No. 07-AFC-6
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(Revised 9/15/2009)

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DECLARATION OF SERVICE

I, Maggie Read, declare that on September 15, 2009, I served and filed copies of the attached, Committee Ruling on Intervenor Power of Vision's Petition to Compel Data Responses, dated September 15, 2009. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[http://www.energy.ca.gov/sitingcases/carlsbad/index.html]**. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

For service to all other parties:

_x___ sent electronically to all email addresses on the Proof of Service list;

_x___ by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

__x__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

_____depositing in the mail an original and 12 paper copies, as follows:

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

Maggie Read

*indicates change