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07-AFC-6
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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	
The Application for Certification for the CARLSBAD ENERGY CENTER PROJECT	Docket No. 07-AFC-6

RESPONSE OF CARLSBAD ENERGY CENTER LLC TO ROB SIMPSON'S REQUEST FOR A WRITTEN ORDER

January 29, 2010

John A. McKinsey
Melissa A. Foster
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
Phone: (916) 447-0700
Facsimile: (916) 447-4781

Attorneys for CARLSBAD ENERGY CENTER LLC

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: **The Application for Certification for the CARLSBAD ENERGY CENTER PROJECT**	**Docket No. 07-AFC-6**

RESPONSE OF CARLSBAD ENERGY CENTER LLC TO ROB SIMPSON'S REQUEST FOR A WRITTEN ORDER

Applicant Carlsbad Energy Center LLC ("Applicant") herein responds to Rob Simpson's ("Simpson") request that the Siting Committee ("Committee") for the Carlsbad Energy Center Project ("CECP" or "Project") issue a written order on certain interlocutory rulings made by the Committee at the January 21, 2010 prehearing conference in the above-captioned proceeding. For the reasons pronounced at the Prehearing Conference and as set forth herein, the Committee should deny Simpson's request.

I. INTRODUCTION

Simpson was granted intervenor status in the CECP proceeding on October 14, 2008 pursuant to Title 20, California Code of Regulations section 1207.[1] As an intervenor, Simpson has "all the rights and duties of a party" to the CECP proceedings. (20 Cal. Code Regs. § 1712(a).)

II. SIMPSON FAILED TO MEET THE REQUIREMENTS FOR FULL PARTICIPATION AT THE CECP EVIDENTIARY HEARINGS.

Simpson has both "rights and duties" under the Warren-Alquist Act regulations in his role as an intervenor and a full party to the CECP proceedings. (20 Cal. Code Regs. § 1712.)

[1] All references herein are to the Warren-Alquist Act regulations located at Title 20, California Code of Regulations, sections 1001 *et seq.*

Included in Simpson's duties is "the responsibility to comply with the requirements for filing and service of documents, the presentation of witnesses and evidence, and any other reasonable conditions which may be imposed by order of the presiding member." (*Id.* § (c).) Simpson ignored his responsibility to inform the Committee and the other parties in a timely manner of his intent or desire to participate in the CECP evidentiary hearings, by failing to file any of the pleadings required by the Committee in the Notice of Prehearing Conference and Evidentiary Hearings ("Notice").[2]

The Committee published its Notice on December 8, 2009 by docketing it in the CECP proceedings, posting it online, and sending it to all parties on the CECP service list, including Simpson. The Notice provided a timeline for each party to submit various pleadings in preparation for evidentiary hearings and outlined the type of information and testimony to be included in pleadings. For the intervenor parties, the Notice provided two deadlines: (1) a date to file opening testimony, a witness list, and a preliminary identification of contested issues; and (2) a date to file rebuttal testimony, a request for copies of materials referenced in other opening testimony, and a prehearing conference statement.

Simpson did not make filings on or before either of these two deadlines and, other than the request at issue here, has not filed any pleadings whatsoever – no opening or rebuttal testimony, no witness list, no preliminary identification of contested issues, and no prehearing conference statement. Despite not having filed any of the requisite pleadings to outline his proposed involvement in and create a record for the evidentiary hearings, Simpson appeared telephonically at the Prehearing Conference on January 21, 2010 and made numerous requests to participate in the CECP evidentiary hearings. Simpson first requested the opportunity to present

[2] In response to a question from the Hearing Officer, Simpson admitted that this was not the first time he has participated in a proceeding before the CEC. He is therefore generally familiar with the CEC process, procedures, and regulations for power plant permitting.

testimony at the hearing. After the Hearing Officer denied this request, Simpson requested permission to "join" other parties in their prehearing conference statements, testify as a witness for other parties, and to cross-examine witnesses. Simpson offered no reason for his failure to file any pleadings, to provide this information in advance of the Prehearing Conference, or for his untimely requests to participate in the evidentiary hearings.

III. THE COMMITTEE WAS REASONABLE AND LENIENT IN ALLOWING SIMPSON TO PARTICIPATE IN THE CECP EVIDENIARY HEARINGS.

Any party to the CECP proceeding is given the right to present witnesses, submit testimony and other evidence, cross examine other witnesses, and file motions, petitions, objections, briefs and other documents relevant to the proceeding, subject to the exercise of the lawful discretion of the presiding member of the Committee. (14 Cal. Code Regs. § 1712(b) (emphasis added).) Along with these rights, each party has the responsibility to comply with the requirements for filing and serving documents and presenting witnesses and evidence. (14 Cal. Code Regs. § 1712(c).) The Notice outlined all of the Committee's requirements for filing, in advance of evidentiary hearings, written testimony and pleadings regarding witnesses to be presented and cross-examined, issues to be heard, and exhibits to support written and oral testimony. In response to questions from one intervenor, the proceeding Hearing Officer clarified for all parties the requirements provided by the Notice to timely submit testimony, witness lists, and exhibits. (Email of Paul Kramer, CEC, to CECP parties, December 31, 2009, attached hereto as Exhibit "A".)

Simpson did not satisfy the Committee's requirement that intervenors file a prehearing conference statement in order to submit himself as a witness. Simpson also failed to outline the issues he wished to testify on or list witnesses he wished to cross examine and/or exhibits he wished to submit for the Committee's consideration along with his testimony or the testimony of

others. Having failed to meet the requirements of the Notice and fulfill his responsibilities under section 1712(c), the Committee justifiably issued a ruling denying, in part, Simpson's untimely requests and allowing him to only cross-examine witnesses after other parties had completed their cross-examination and only if Simpson's questions dealt with material not covered by prior direct or cross-examination. The Committee's leniency was within the lawful discretion afforded the Committee in such matters under section 1712.

As the Committee explained at the Prehearing Conference, it would allow Simpson to participate in only a limited capacity at the hearings because he failed to follow the Committee's procedures. His failure to make the requisite filings and overall tardiness would create an unfair disadvantage to Applicant and other parties that timely submitted their pleadings and provided notice to all other parties of the witnesses and testimony they would offer into evidence. Because of Simpson's continued failure to provide any written documentation, the parties still have no advance notice of the basis or scope of Simpson's planned cross-examination. Upon being denied permission to present his own case, Simpson unilaterally asked to join the other intervenors' prehearing conference statements without any advance notice of this request. Simpson's attempt to bootstrap his participation in the CECP hearings by participating on behalf or in place of other parties' witnesses flaunts the Commission's rules and jeopardizes the Hearing Officer's ability to conduct an orderly proceeding. The Committee correctly refused to allow such unfair, unjustified, and unprecedented behavior and participation.

IV. SIMPSON INACCURATELY STATES THE COMMITTEE'S RULINGS AT THE PREHEARING CONFERENCE.

Simpson requested a written order regarding his alleged request at the prehearing conference that "the Commission take Notice of my Appeal of the Final Determination of Compliance before the San Diego Air Pollution Control District Hearing Board … and the

Commission policy of failing to keep a record of Workshops where the public Notice issued indicates that the purpose of the Workshop is to 'receive comments'."

The Committee did not make a ruling regarding Simpson's request for the Committee to take notice of his appeal of the San Diego Air Pollution Control District ("SDAPCD") Final Determination of Compliance ("FDOC"). Simpson has not made a motion pursuant to section 1716.5 and section 1213 to introduce documents into evidence. Simpson has not explained which materials from the appeal he wished the Committee to take notice of. Thus, there was no motion for administrative notice on which the Committee could rule.

Simpson could have introduced SDAPCD documents as exhibits and his questions or issues related to the appeal as testimony for evidentiary hearings, but Simpson chose not to do so. Thus, the Committee properly concluded that Simpson's introduction of substantive matters at the prehearing conference was not appropriate.

The Committee also did not issue any ruling related to the staff workshop held December 2, 2009 for the Project, though Simpson requested a written order on Commission policy to keep a record of such workshops. In fact, there is no "policy" or "failure" regarding the workshop for the Committee to rule on. Staff held this workshop pursuant to section 1718(a) to provide an opportunity for public comment and inquiry about the Project. The workshop was properly noticed to the public and all parties to the proceeding, including Simpson, on November 12, 2009. The workshop was intended as an informal forum for discussion and questions about air quality issues and other Project topics of interest to the public. There is no statutory or regulatory requirement for the CEC to hold such a workshop and, if it does, there is no requirement to create a record of it. Accordingly, this workshop was not recorded. Public comments and questions asked at the workshop were responded to during the workshop by CEC

staff, APCD officials, and Applicant experts that were on hand.

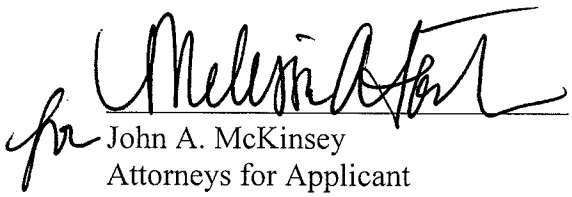
It is significant that Simpson did not attend or otherwise participate in the workshop despite ample notice and the opportunity to participate telephonically. Nonetheless, at the prehearing conference, Simpson took issue with the fact that the workshop was not recorded, so that the public's questions and staff's or Applicant's responses to these questions would be documented.[3] However, since there is no requirement to conduct a workshop or to record it, there was no "failure" by the Commission. In sum, there was no issue regarding the workshop or any Commission policy regarding workshops in general, for the Committee to rule on and no ruling was issued at the prehearing conference.

V. CONCLUSION

The Committee appropriately ruled on the requests made by Simpson at the Prehearing Conference to participate in CECP evidentiary hearings. The Committee leniently granted Simpson permission to cross-examine witnesses, despite his failure to file opening or rebuttal testimony or abide by the Committee's requirements to inform the Committee and other parties in advance of one's intention to bring witnesses on a certain topic or cross-examine other witnesses. For the reasons pronounced at the Prehearing Conference and as set forth herein, the Committee should deny Simpson's request.

Date: January 29, 2010

Stoel Rives LLP



John A. McKinsey
Attorneys for Applicant
CARLSBAD ENERGY CENTER LLC

[3] Simpson does not claim that he made comments that were not properly taken under submission or responded to.

EXHIBIT A

Cook, Allison D.

From: McKinsey, John A.
Sent: Thursday, December 31, 2009 7:17 PM
To: [redacted]

Subject: Fw: Fwd: Re: Parties: 07-AFC-6 Carlsbad POS

----- Original Message -----
From: Paul Kramer <Pkramer@energy.state.ca.us>
To: gsmith@adamsbroadwell.com <gsmith@adamsbroadwell.com>; siekmann1@att.net <siekmann1@att.net>; e-recipient@caiso.com <e-recipient@caiso.com>; joe.garuba@carlsbadca.gov <joe.garuba@carlsbadca.gov>; megan.sebra@ch2m.com <megan.sebra@ch2m.com>; robert.mason@ch2m.com <robert.mason@ch2m.com>; rball@ci.carlsbad.ca.gov <rball@ci.carlsbad.ca.gov>; allanori@comcast.net <allanori@comcast.net>; William Rostove <wrostov@earthjustice.org>; Docket Optical System <Docket.HQPO2.SacHQ@energy.state.ca.us>; Dick Ratliff <Dratliff.HQPO4.SacHQ@energy.state.ca.us>; Galen Lemei <GLemei.HQPO2.SacHQ@energy.state.ca.us>; Jim Boyd <Jboyd.HQPO4.SacHQ@energy.state.ca.us>; Karen Douglas <KLdougla.HQPO2.SacHQ@energy.state.ca.us>; Marlena Elliott <Melliott.HQPO4.SacHQ@energy.state.ca.us>; Mike Monasmith <Mmonasmi.HQPO4.SacHQ@energy.state.ca.us>; Public Adviser's Office <Pao@energy.state.ca.us>; Paul Kramer <Pkramer.HQPO4.SacHQ@energy.state.ca.us>; Sarah Michael <SMichael.HQPO2.SacHQ@energy.state.ca.us>; david.lloyd@nrgenergy.com <david.lloyd@nrgenergy.com>; tim.hemig@nrgenergy.com <tim.hemig@nrgenergy.com>; rob@redwoodrob.com <rob@redwoodrob.com>; powerofvision@roadrunner.com <powerofvision@roadrunner.com>; McKinsey, John A.
Sent: Thu Dec 31 16:47:17 2009
Subject: Fwd: Re: Parties: 07-AFC-6 Carlsbad POS

Carlsbad AFC parties:

The email from Ms. Siekmann prompts me to make the following general statements, based on something I recently sent to the Ivanpah AFC parties. Keep in mind that these are general, hypothetically based comments; a committee ruling on any objections to evidence or testimony will be based on the specific circumstances and facts then at hand. Nonetheless, I hope that this will help you to prepare your responses due in preparation for the hearings.

The exchange of opening (due January 6) and then rebuttal evidence (due January 14) and the identification of witnesses in Prehearing Conference Statements (also due January 14) is intended to avoid the introduction of last minute "surprise" evidence, whether live or on paper. Documents or testimony offered at the hearings that were not previously identified are subject to exclusion on the motion of a party or the Committee, unless good cause for its late introduction is shown. Changes to earlier filed testimony made after the filing deadline may be subject to exclusion; I can be no more specific until a specific example presents itself. For what its worth, my comments to the Ivanpah parties were prompted, in large part, by a party purporting to reserve the right to modify its testimony up to the end of the Evidentiary Hearings.

Evidence is the testimony of an individual--facts, opinions, or both--offered to prove a point or to refute something another party has said in its testimony. Questions about another party's testimony (ie., the FSA) are

probably in the nature of cross-examination. You don't need to supply the questions in advance but you do need, in your Prehearing Conference Statement, to indicate your intention to cross-examine on the topic and identify any specific witnesses you want to be made available at the hearings. Comment about another party's testimony is probably argument on the law or facts or public comment, neither of which is required, but can be submitted, prior to the hearings. (Remember that public comment cannot by itself support a Commission finding; it can only serve to support sworn testimony.)

If you intend to ask the Committee to take official notice of an official document or report, you must identify that document along with your opening testimony. This gives the other parties a chance to look at the document and respond, if necessary, with rebuttal testimony. Courtesy suggests that you provide a link to the document and, if you are providing electronic documents, include a copy on that CD. If the document is not readily available via a link, then you must provide electronic or paper copies.

Regarding copies of exhibits, the Notice says:

"Printed or electronic (i.e., email or compact disk) copies of the Exhibits shall be provided to the Committee and other parties no later than 4 p.m. on the dates set forth in the filing schedule table, above. If sent by email, a compact disk or paper copy shall also be placed in the first class or overnight mail by the deadline. In addition, a printed copy of all exhibits shall be provided to the Hearing Officer no later than January 21, 2010."

It is normally enough to supply one electronic and one paper copy to Dockets as the filing regulations allow. to Talk to the Staff Project Manager about how many copies (CD or paper) that staff needs.

The Committee needs, as another portion of the notice says, two hard copy sets, one set collating the exhibits by exhibit number and the other breaking down the exhibits by (FSA) topic area.

Rules quite often have exceptions, of course, and, with good cause shown, more leeway might be allowed. It is not something you can or should rely upon, however.

Paul Kramer
Hearing Officer

>>> Kerry Siekmann <siekmann1@att.net> 12/30/2009 2:02 PM >>>
Maggie
I am an intervener regarding AFC-6 Carlsbad Project. I am a little confused regarding procedures.
1) Almost all of my testimony is related to the FSA- by comment or question? Is that proper?
2) For testimony due on Jan. 6, 2010, do I need to docket it and send hard copies to the Proof of Service List?
3) Am I able to edit my testimony after it is docketed?
4) Do I need to send hard copies to each of the Energy Commission individuals listed as they are all at the same address?
5) What if I am not able to complete all of my expert witness testimony by Jan. 6?
Can I summarize it and docket their declaration and resume by Jan 14?
6) Do I need to have all of my exhibits by Jan. 6 or Jan. 14 or Jan. 20 or Feb. 1?

From: Maggie Read <Mread@energy.state.ca.us>
To: gsmith@adamsbroadwell.com; siekmann1@att.net; e-recipient@caiso.com; joe.garuba@carlsbadca.gov; ron.ball@carlsbadca.gov; megan.sebra@ch2m.com; robert.mason@ch2m.com; allanori@comcast.net; William Rostove <wrostov@earthjustice.org>; Docket Optical System <Docket@energy.state.ca.us>; Dick Ratliff <Dratliff@energy.state.ca.us>; Galen Lemei <GLemei@energy.state.ca.us>; Jim Boyd

<Jboyd@energy.state.ca.us>; Karen Douglas <KLdougla@energy.state.ca.us>; Marlena Elliott <Melliott@energy.state.ca.us>; Mike Monasmith <Mmonasmi@energy.state.ca.us>; Public Adviser's Office <Pao@energy.state.ca.us>; Paul Kramer <Pkramer@energy.state.ca.us>; Sarah Michael <SMichael@energy.state.ca.us>; david.lloyd@nrgenergy.com; tim.hemig@nrgenergy.com; rob@redwoodrob.com; powerofvision@roadrunner.com; John McKinney <jamckinsey@stoel.com>
Sent: Wed, December 30, 2009 9:27:22 AM
Subject: Parties: 07-AFC-6 Carlsbad POS

A hard copy of the attached document,
(All Parties Letter and Proof of Service List)
will be delivered and filed with the Docket Unit.
You will be receiving a hard copy in the mail shortly.

If you have any questions, please do not hesitate to contact the office.

Regards,

MAGGIE READ
CaliforniaEnergy Commission
Hearing Office
1516 Ninth Street, MS-9
Sacramento, CA 95814
(916) 654-3893
mread@energy.state.ca.usMaggie Read
Hearing Adviser's Office
California Energy Commission
(916) 654-3893
Mread@energy.state.ca.us
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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 FOR THE CARLSBAD ENERGY CENTER PROJECT	Docket No. 07-AFC-6 PROOF OF SERVICE (Revised 1/27/2010)

Carlsbad Energy Center LLC's
Re Response of Carlsbad Energy Center to Rob Simpson's Request for a Written Order

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT
David Lloyd
Carlsbad Energy Center, LLC
1817 Aston Avenue, Suite 104
Carlsbad, CA 92008
David.Lloyd@nrgenergy.com

George L. Piantka, PE
Carlsbad Energy Center LLC
1817 Aston Avenue, Suite 104
Carlsbad, CA 92008
george.piantka@nrgenergy.com

APPLICANT'S CONSULTANTS
Robert Mason, Project Manager
CH2M Hill, Inc.
6 Hutton Centre Drive, Ste. 700
Santa Ana, CA 92707
Robert.Mason@ch2m.com

Megan Sebra
CH2M Hill, Inc.
2485 Natomas Park Drive, Ste. 600
Sacramento, CA 95833
Megan.Sebra@ch2m.com

COUNSEL FOR APPLICANT
John A. McKinsey
Stoel Rives LLP
500 Capitol Mall, Ste. 1600
Sacramento, CA 95814
jamckinsey@stoel.com

INTERESTED AGENCIES
California ISO
P.O. Box 639014
Folsom, CA 95763-9014
(*e-mail preferred*) e-recipient@caiso.com

INTERVENORS
City of Carlsbad
South Carlsbad Coastal Redevelopment Agency
Allan J. Thompson
Attorney for City
21 "C" Orinda Way #314
Orinda, CA 94563
allanori@comcast.net

City of Carlsbad
South Carlsbad Coastal Redevelopment Agency
Joseph Garuba, Municipals Project Manager
Ronald R. Ball, Esq., City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008 (*e-mail preferred*)
Joe.Garuba@carlsbadca.gov;
ron.ball@carlsbad.ca.gov

Terramar Association
Kerry Siekmann & Catherine Miller
5239 El Arbol
Carlsbad, CA 92008
siekmann1@att.net

California Unions for Reliable Energy ("CURE")
Gloria D. Smith & Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
gsmith@adamsbroadwell.com
mdjoseph@adamsbroadwell.com

INTERVENORS
Center for Biological Diversity
c/o William B. Rostove
EARTHJUSTICE
426 17th St., 5th Floor
Oakland, CA 94612
wrostov@earthjustice.org

Power of Vision
Julie Baker and Arnold Roe, Ph.D.
4213 Sunnyhill Drive
Carlsbad, CA 92008-3647
powerofvision@roadrunner.com

Rob Simpson
Environmental Consultant
27126 Grandview Avenue
Hayward, CA 94542
rob@redwoodrob.com

ENERGY COMMISSION
JAMES D. BOYD
Vice Chair and Presiding Member
jboyd@energy.state.ca.us

ANTHONY EGGERT
Commissioner and Associate Member
aeggert@energy.state.ca.us

Paul Kramer
Hearing Office
pkramer@energy.state.ca.us

Mike Monasmith
Siting Project Manager
mmonasmi@energy.state.ca.us

Dick Ratliff
Staff Counsel
dratliff@energy.state.ca.us

Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Judith Warmuth, declare that on January 29, 2010, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, 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.

Judith Warmuth