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November 2, 2010

VIA EMAIL AND US MAIL

The Honorable James D. Boyd, Presiding Member
The Honorable Anthony Eggert, Associate Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

**Re: Carlsbad Energy Center Project (07-AFC-6)
Response to Power of Vision and Energy Commission Staff Requests for
Committee to Take Notice of Certain Materials**

Dear Commissioners:

Carlsbad Energy Center LLC ("Applicant") herein replies to Power of Vision ("POV") and the California Energy Commission (the "Commission") Staff's letters submitted to the Committee wherein each party requests the Committee take official notice of materials purportedly related to the Carlsbad Energy Center Project ("CECP" or the "Project") application for certification proceeding. The requests were made after the deadline of the post-evidentiary hearing briefing. Therefore, Applicant herein responds to these requests pursuant to Title 20, California Code of Regulations, section 1213.¹

¹ Applicant presumes POV and Staff's correspondence requesting the Committee take official notice of certain documents is based on the Commission's "Official Notice" regulation, Title 20, California Code of Regulations, section 1213. In pertinent part, Section 1213 states: "[d]uring a proceeding the commission may take official notice of any generally accepted matter within the commission's field of competence, and of any fact which may be judicially noticed by the courts of this state...."



The Honorable James D. Boyd, Presiding Member
November 2, 2010
Page 2

I. BACKGROUND

Upon the close of the evidentiary hearings for CECP, the Committee issued an order setting forth the post-evidentiary briefing schedule. Opening briefs were due filed and served not later than August 18 and reply briefs were due filed and served not later than September 22. On September 16, Staff filed a request to extend the date by which reply briefs were due to October 11. The Committee granted that request. Accordingly, the parties filed and served reply briefs on or before October 11, 2010.

Along with its post-evidentiary reply brief, however, intervenor Center for Biological Diversity (“CBD”) filed a petition to reopen the administrative record and request to take official notice of two reports (the “Petition”).² On October 26, Applicant timely filed a formal response to CBD’s petition opposing CBD’s late submission of purported evidentiary documentation and request to reopen the evidentiary record. Applicant responded to the Petition by stating that at this point in the proceedings, the evidentiary record should remain closed and only the most relevant material should be admitted.

On October 14, 2010, Staff filed a letter with the Committee calling to “the Committee’s attention...a very recent United States Ninth Circuit Court of Appeals case titled *South Coast Air Quality Management District v. FERC* (Sept. 9, 2010) ___ F.3d ___ No 08-72265 (2010 WL 3504649, that is relevant to...” the liquefied natural gas issues presented in the CECP proceeding (the “Ninth Circuit Decision”). Staff also attached to the letter an article that discusses the abundance of untapped natural-gas deposits in the United States.

Four days after Staff filed its request, intervenor Power of Vision (“POV”) submitted correspondence to the Committee noting and objecting that Staff “failed to respond to any issues raised by [POV]” in its Opening Brief. The letter’s last paragraph then asks the Committee to take notice of an attached San Diego Union Tribune article (the “Article”). The Article relates to the decommissioning of the South Bay Power Plant in San Diego County. On October 25, 2010, CBD responded to Staff’s letter requesting the Committee take notice of the Ninth Circuit

² The reports were titled *California’s Clean Energy Future: An Overview on Meeting California’s Energy and Environmental Goals in the Electrical Power Section in 2020 and Beyond* and *California’s Clean Energy Future: Implementation Plan* and were co-authored by the California Air Resources Board, Energy Commission (“Commission”), Public Utilities Commission, California Environmental Protection Agency, and California Independent System Operator (“CA-ISO”).



The Honorable James D. Boyd, Presiding Member
November 2, 2010
Page 3

Decision. CBD contends that Staff fails to provide any justification for such a “late-filed” submission.

Applicant responds herein to Staff’s October 14 request, CBD’s October 25 response thereto, and POV’s request for the Committee to take notice of the Article

II. TAKING NOTICE OF RELEVANT MATERIALS DOES NOT REQUIRE REOPENING OF THE RECORD

CBD’s Petition to reopen the CECP AFC evidentiary record is unwarranted. In fact, no party has raised an issue that warrants reopening of the record. The Committee closed the evidentiary record at the end of the evidentiary hearing (the “Hearing”) on February 4, 2010. Parties who participated at the four-day Hearing presented oral and written testimony, all of which was subject to the Energy Commission’s rules of evidence. (20 Cal. Code Regs. § 1212(b).) CBD fails to consider that the Committee “may take official notice of any generally accepted matter within the commission’s field of competence...” (20 Cal. Code Regs. § 1213.)

Furthermore, Section 1213 allows the parties to be “given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.” Thus, not only could CBD have simply submitted the Reports requesting the Committee to take notice, the CEC’s regulations afford Applicant, and other parties, an opportunity to refute relevancy of the materials, or take any other issue with the Reports, the Ninth Circuit Decision or POV’s Article.

POV and Staff appropriately requested that Committee take notice of the Article and the Ninth Circuit Decision, respectively. Neither party requested the Committee reopen the evidentiary record in an effort to introduce additional evidence. For the reasons stated herein, Applicant opposes POV’s request because the Article is entirely irrelevant to the CECP proceeding, but Applicant supports Staff’s request that the Committee notice the Ninth Circuit Decision because the decision is highly relevant.

III. POV’S ARTICLE IS NOT RELEVANT TO THE CECP PROCEEDING

The Committee should reject POV’s request because the Article is not relevant to the CECP proceeding. POV contends that the Article is relevant because the Article discusses CA-ISO’s decision to allow the early retirement of the South Bay Power Plant (“South Bay”). South Bay was not scheduled to be decommissioned until January 2012 because CA-ISO had previously identified the aging, inefficient power plant as Reliability Must Run (“RMR”). However, CA-



The Honorable James D. Boyd, Presiding Member
November 2, 2010
Page 4

ISO recently determined its 2011 demand forecast no longer required South Bay to stay on line and released the power plant from its RMR status. South Bay is now scheduled to shut down and begin decommissioning activities in January 2011.

South Bay's RMR status has no bearing on the CECP proceeding. CA-ISO's demand forecast for 2011 is irrelevant because CECP is not scheduled to come online until sometime after 2014. At that time, CA-ISO's demand forecast is likely to be a much different picture. Further, regardless of demand forecast, there is no "need" or "demand conformance" requirement for the CEC to certify a facility. (*Compare* Public Resources Code, section 25523.5 (1999), *repealed by* Senate Bill 110 (1999-2000 Reg. Sess.), section 3, *with* Public Resources Code, section 25523.5 (2010).)

Despite Applicant's belief that the Article is not relevant to the CECP proceeding, should the Committee disagree and determine POV's Article is relevant, Applicant would like to highlight the following points contained in the Article:

1. South Bay is a 50 year-old merchant plant using inefficient, aging technology. CECP would be one of the "most state-of-the-art, environmentally friendly power plants in the world." (*See* Article at p. 2, citing Jim Avery, Vice President SDG&E.)
2. South Bay's electricity generation is being replaced by generation produced by the Otay Mesa Generating Project. CECP would replace generation currently produced by Encina Generating Station's Units 1 through 3. (*See* Article at p. 2, "[South Bay] has become less crucial to the region as new, more efficient plants have been built, including ...Otay Mesa... .")

Applicant does not dispute the method by which POV is requesting the Committee take official notice of the Article. However, Applicant does not believe that the Article 1) is relevant to the CECP proceeding; or 2) should be included in the evidentiary hearing materials.

IV. THE COMMITTEE SHOULD OFFICIALLY NOTICE THE NINTH CIRCUIT DECISION SUBMITTED BY STAFF BECAUSE IT IS HIGHLY RELEVANT TO THE CECP PROCEEDING

While the Article that POV submitted to the Committee is irrelevant to the CECP Proceeding, the Ninth Circuit Decision submitted by Staff is highly relevant. The case highlights an issue raised by CBD during the Hearing, namely whether Staff adequately considered the allegedly higher greenhouse gas emissions from liquefied natural gas ("LNG") that could be imported through Mexico to California and burned in California power plants. As Staff pointed out in its



The Honorable James D. Boyd, Presiding Member
November 2, 2010
Page 5

October 14 letter to the Committee, the Ninth Circuit Decision addresses the speculative nature of LNG imports and usage in California and concludes that “there remains substantial uncertainty about the eventual burning of North Baja gas [LNG].” (Staff’s October 14, 2010 Letter at p. 2; Ninth Circuit Decision at *13).

Staff’s request that the Committee to take official notice was procedurally proper, and the Committee should grant the request because the Ninth Circuit Decision is highly relevant to the CECP Proceeding. Applicant, however, does not believe, nor does Applicant believe Staff is requesting, that the Committee reopen the CECP evidentiary record in order to take official notice of the Ninth Circuit Decision.

V. CONCLUSION

For the foregoing reasons, Applicant requests that the Committee reject POV’s request to take official notice of the October 17, 2010 San Diego Union Tribune Article because the Article is not relevant to the CECP proceeding. On the contrary, the Committee should grant Staff’s request that the Committee take official notice of the Ninth Circuit Decision. The Ninth Circuit Decision is highly relevant to key issues presented throughout the CECP proceeding, including the evidentiary hearing and post-hearing briefs.

Very truly yours,

John A. McKinsey

JAM:kjh

cc: See Enclosed Proof of Service List

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APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 6/14/2010)

Carlsbad Energy Center LLC's
Applicant's Response to Power of Vision and Energy Commission Staff Requests
for Committee to Take Official Notice of Certain Materials

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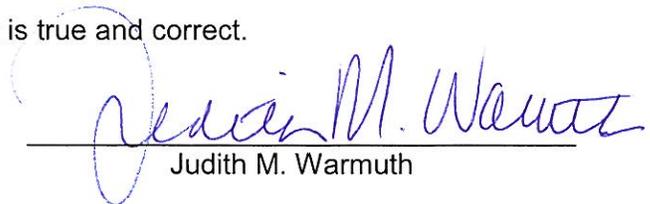
DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on November 2, 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 M. Warmuth