



November 12, 2010

VIA EMAIL AND U.S. MAIL

The Honorable James D. Boyd
Presiding Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

The Honorable Anthony Eggert
Associate Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Paul Kramer
Hearing Officer
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

DOCKET
07-AFC-6
DATE <u>NOV 12 2010</u>
RECD. <u>NOV 15 2010</u>

Re: Carlsbad Energy Center Project (07-AFC-6) Response to Applicant’s Letter of November 2, 2010

Dear Commissioners Boyd and Eggert and Hearing Officer Kramer:

The Center for Biological Diversity (the “Center”) provides the following response to Applicant’s November 2, 2010 letter entitled “Response to Power of Vision and Energy Commission Staff Request for Committee to Take Notice of Certain Materials.” The Center files this letter because Applicant’s letter includes additional argument on the Center’s Petition to Reopen the Administrative Record and Request to Take Official Notice. Besides omitting key facts from its procedural history, the Applicant takes a second bite at the apple in responding to the Center’s filing. The Center responds to these additional arguments.

First, the Applicant misconstrues the Center’s filing by focusing solely on the Petition to Reopen the Administrative Record. The Center’s filing had two components: 1) Petition to Reopen the Administrative Record and 2) Request For Official Notice. Second, Applicant argues that the Center’s Petition was untimely, but Applicant ignores the fact that both documents submitted were published after the administrative record was closed. A procedure to reopen the record was designed for just this type of scenario where documents are unavailable during the hearing process.

Third, alternatively, even if the Center was not required to Petition to Reopen the Record, the Center properly requested Official Notice. Applicant argues that a request for Official Notice was the only procedure necessary but ignores the fact that the Center simultaneously made a request for Official Notice with its Petition. At worst, the Center complied with more procedures than Applicant thought appropriate. Furthermore, contrary to

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claims made by Applicant, the Center made a sufficient showing that the documents were relevant. In its request, the Center states that the reports “provide the most up-to-date relevant information on California energy issues relating to the proceeding.” Additionally, the Center’s Reply Brief references and quotes specific sections of these documents and refers to the Request for Official Notice. (*See* Center for Biological Diversity’s Post-Evidentiary Hearing Reply Brief at 12-13, 17-19.) The Center requested notice of the whole document to ensure a full record.

Additionally, it is improper for Applicant to claim that Staff’s letter is a request for Official Notice. Staff is represented by able counsel and Staff did not identify its letter as such. Moreover, taking Official Notice of a Ninth Circuit Decision is an inappropriate use of this procedure. Case law is used to support legal argument. Applicant and Staff use this case to improperly argue their position after the deadlines for post-hearing briefing expired. Additionally, both Staff and Applicant improperly attempt to import conclusions based on an entirely different record into this proceeding. However, if the Committee were to consider *South Coast Air Quality Management District v. FERC* (Sept. 9, 2010) ___ F.3d ___ No 08-72265 (2010 WL 3504649), the Center explained, in its letter dated October 25, 2010, that the decision supports the Center’s position that the environmental analysis in this case improperly fails to consider the greenhouse gas emissions from the use of LNG at the Project.

Yours very truly,

A handwritten signature in black ink, appearing to read "William Rostov", with a long horizontal flourish extending to the right.

William B. Rostov
Counsel for the Center for Biological
Diversity



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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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 11/3/2010)

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on November 12, 2010, I served and filed copies of the attached Response to Applicant's Letter of November 2, 2010. 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: [\[http://www.energy.ca.gov/sitingcases/carlsbad/index.html\]](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:

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

- 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

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

I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.


