



October 25, 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

DOCKET	
07-AFC-6	
DATE	<u>OCT 25 2010</u>
RECD.	<u>OCT 25 2010</u>

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

Re: Response to California Energy Commission’s Improper Filing of Ninth Circuit Case and Associated Press Story.

Dear Commissioners Boyd and Eggert and Hearing Officer Kramer:

The Center for Biological Diversity (the “Center”) adamantly objects to the California Energy Commission Staff’s (“Staff”) October 14, 2010 late-filed letter submission to the Siting Committee and the Hearing Officer. This letter and its attachment should be wholly disregarded because Staff fails to provide any justification in the Commission rules for such a submission. The rules simply do not provide a mechanism for Staff to casually submit new argument and purportedly new record evidence **after** the post-hearing reply briefs were due. Besides providing no legal justification, Staff’s submission is even more outrageous because Staff requested additional time for its Reply Brief and then choose not to respond the Center’s Opening Brief. Only after the time for post-evidentiary briefing has run does Staff point to any case in an attempt to support its position on Liquefied Natural Gas (“LNG”). The Center respectfully urges the Committee to disregard this filing. Alternatively, an examination of this case shows that it supports the Center’s position that an environmental analysis of the greenhouse gas emissions from the use of LNG should have been conducted.

A brief procedural history of the proceedings shows the egregious nature of Staff’s request. In its October 14, 2010 letter, Staff submits a Ninth Circuit case, *South Coast Air Quality Management District v. FERC* [SCAQMD v. FERC] (Sept. 9, 2010) ___ F.3d ___ No 08-72265 (2010 WL 3504649), and argues that this case supports its position. Staff’s sole justification for its late filing is that the case “is so recent that Staff has only just discovered it, and could not include it in its brief.” This justification has no merit because the case is dated September 9, 2010, a full month before its Reply Brief’s due date. Staff provides a cite to Westlaw where some simple

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searches would have found this case. More importantly, it was Staff that requested an extension to file its Reply and it was Staff that chose the October 11, 2010 due date, which the Committee subsequently approved. (Committee Order Extending Reply Brief Deadline [Sept. 22, 2010].) Yet, a mere three days after the due date, Staff filed more argument on the LNG issue.

Staff's late filed argument is especially perplexing given its position on Reply. Staff states "Energy Commission Staff (Staff) believes that most of the issues raised by other parties in their opening briefs have been adequately addressed in Staff's Opening Brief, and will avoid repeating previous discussion addressing such issues. Only issues requiring further elaboration are addressed below." (Energy Commission Staff Reply Brief at 1.) On Reply, Staff did not address the Center's forty-two page brief **at all**. Seven pages of that brief were dedicated to arguing that pursuant to CEQA the use of LNG should have been included in the project description and that the resulting greenhouse gas emissions should have been studied in the environmental analysis. (Center Opening Br. at 5-12.) On Reply, the Center spent another five pages rebutting Staff and Applicant on the LNG issue. (Center Reply Br. at 4-9.) Only after the Center filed its Reply did Staff deign to address the Center's argument. Staff chose a high risk approach of ignoring an Opening Brief. Staff should not now be allowed to change its mind and file untimely argument and purported evidence to support its position.

Additionally, Staff's argument should be disregarded because Staff argues that a court's conclusions based on an entirely different record should somehow be imported into this proceeding. As Staff is well aware, the Committee cannot rely on the record of another administrative proceeding. By the Commission's own regulations and procedures, its decisions must be based on the record before it, not some other record in existence. (*See* Cal. Energy Comm'n, Rules of Practice and Procedure & Power Plant Certification Regulations: Siting Regulations § 1751 ["Presiding Member's Proposed Decision; Basis. (a) The presiding member's proposed decision *shall be based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application.* (b) The presiding member's proposed decision shall contain reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision"] [emphasis added].) Staff improperly argues that a quote from *SCAQMD v. FERC* provides record evidence that should be use to justify Staff's "speculation" theory. As discussed in the Center's Reply Brief, even if there is additional domestic supply of LNG, it is reasonably foreseeable that LNG will be imported to the CECP. (Center's Reply Brief at 5 [Citing IEPR at 133, 140, and 243].) The IEPR, which is part of the administrative record, confirms this. Citing concerns about increased demand for domestic natural gas at new power plants throughout the Southwest reducing the amount of natural gas available to California, the 2009 IEPR then stresses that "California does have potential new sources of natural gas from an existing LNG import facility in Baja, Mexico, along with pipeline projects on the horizon." (IEPR at 139-40.) The IEPR also notes in its Recommendations for Natural Gas that:

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Plentiful supplies of natural gas will moderate prices and make natural gas an attractive option throughout the West as the electricity industry starts to build a less carbon-intensive infrastructure. Because California is at the end of the gas supply pipelines, demand for natural gas “upstream” of California could increase competition and prices and reduce available supplies for California.

(IEPR at 243.)

Furthermore, Staff selectively excerpts language from a recent Ninth Circuit’s opinion to support its position, and, by taking it out of context, makes an inartful attempt to justify noncompliance with CEQA. Staff cites *SCAQMD v. FERC* to support its proposition that the Committee does not have to consider, analyze, or quantify the higher greenhouse gas contribution from liquefied natural gas that could be imported through Mexico to California and used in the CEC. But *SCAQMD v. FERC* is inapposite, and if anything, stands for the proposition that CEC must consider the downstream environmental impacts of LNG emissions. (*SCAQMD v. FERC*, at *5.)

Staff conveniently ignores the fact that FERC, in *SCAQMD v. FERC*, did exactly what CEC is being asked to do—which is consider the downstream environmental impacts of LNG emissions. Both FERC and the Ninth Circuit recognized that the agency had the obligation to consider the extra air emissions that would result from burning LNG imported from overseas and burned in California. In that case, FERC considered the environmental impact of these emissions under NEPA, where the CEC is disavowing its obligation to consider these impacts. The Ninth Circuit expressly acknowledged this, stating “[i]n sum, in its EIS, FERC explicitly considered the environmental impact of downstream emissions and imposed what it reasonably believed to be effective measures to mitigate the impact.” (*Ibid.*, at *5.) Contrary to the CEC’s characterization of the opinion, the Ninth Circuit repeatedly discussed how FERC did, in fact, consider the downstream impacts of LNG emissions:

After acknowledging that there exists the potential for environmental effects stemming from the North Baja project, FERC determined that the North Baja pipeline certificate should be conditioned on compliance with CPUC’s maximum WI level of 1385. Specifically, FERC’s final EIS required North Baja to “only deliver gas that meets the strictest applicable gas quality standards imposed by state regulatory agencies on downstream [local distribution companies] and pipelines.” Based on CPUC’s earlier gas quality findings, which lowered the maximum WI for gas burned in California from 1437 to 1385, FERC determined that “consumption of [gas] transported by North Baja and meeting CPUC’s WI standard of 1385 or less, *by definition*, should not result in a material increase in

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air pollutant emissions,” regardless of the type or source of natural gas entering the Basin by way of the North Baja pipeline (emphasis added).

(*Ibid.* at *5 [emphasis in original].) Notably, *SCAQMD v. FERC* only addresses traditional air pollutants and does not address the emissions of greenhouse gases at issue in this proceeding.

Furthermore, the notion of “uncertainty” about the effects of the air emissions discussed in *SCAQMD v. FERC* does not relieve the Commission of its duty to consider the use and impact of GHG emissions from the burning of LNG in this proceeding. Although the Ninth Circuit does note the uncertainty in the data regarding criteria pollutant emissions from the burning of LNG, it *never* held that uncertainty relieves the agency from considering the use of LNG. The CEC, like FERC, must still undertake a “reasonably thorough discussion of the environmental impact of its actions, based on information then available to it.” (See *ibid.* at *6 [emphasis added].) The Ninth Circuit states that “given circumstances that suggest a significant amount of uncertainty regarding the issue of the ultimate impact of burning imported natural gas delivered by North Baja...FERC’s analysis was reasonably thorough.” (*Ibid.*, at *6.) Thus, this holding actually acknowledges the agency’s obligation to conduct a “reasonably thorough” consideration of environmental impacts based on the information available. Merely because *another agency* found a different issue to be uncertain based on *the record before that other agency* Staff cannot contend that the use of LNG at CECP is “speculative” and its potential impacts may be ignored.

Remarkably, Staff argues that “[i]n summing up its decision, the Court concluded that ‘there remains substantial uncertainty regarding the eventual burning of North Baja gas [LNG].’” (Staff letter at 2 [citing *ibid.*, at *13].) Staff mischaracterizes this quote by failing to reveal that it is used within the context of standards set pursuant to the Clean Air Act (“CAA”), not CEQA—and is completely inapplicable to why the Ninth Circuit upheld FERC’s environmental review document. The full sentence reads as follows:

Because the CAA does not require that FERC attempt to “leverage its legal authority to influence or control” state air quality issues, and because there remains substantial uncertainty regarding the eventual burning of North Baja gas, FERC is not obligated to perform a *full conformity determination regarding such burning under the CAA*.

(*Ibid.* at *13 [emphasis added].) Staff has taken this particular statement completely out of context and cited it for a proposition for which it simply does not apply. The uncertainty identified by the Court relates to the heat of gas to be burned as a measure on the Wobbe Index; this uncertainty refers to air emissions data not to whether LNG will be delivered to Southern California. (*Ibid.* at *12.) The fact that *another agency*, under a *different statute*, at a *different time*,

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declined to undertake *further analysis* (as opposed to any analysis) on the downstream impacts of LNG emissions does not support the proposition that the Commission is relieved from considering the greenhouse gas emissions of the use of LNG at the CECP. California law places an independent obligation on the Commission to base its findings on the record before it in these proceedings, not on the record before some other agency in different proceedings regarding different statutes and legal standards.

Finally, Staff makes a feeble attempt at trying to bolster the record by attaching a newspaper article to its letter. Not only is this article not properly placed in the administrative record, its content does nothing to bolster Staff's argument. The article simply says that the United States has more natural gas available than previously believed. The Center addresses this very issue on Reply. (*See Center's Reply Brief at 5.*)

CONCLUSION

For the foregoing reasons, the Committee should not consider Staff's letter dated October 14, 2020 and its attachment. Alternatively, if the Commission were to consider *SCAQMD v. FERC*, it should be used to support the proposition 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



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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)**

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on October 25, 2010, I served and filed copies of the attached Letter re: Response to CEC's Improper Filing, dated October 25, 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
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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.


