

STATE OF CALIFORNIA
Energy Resources Conservation and
Development Commission

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In the Matter of:)
Application for Certification for the)
Carlsbad Energy Center Project)
(CECP))
_____)

Docket No 07-AFC-6

**City of Carlsbad and Carlsbad Redevelopment Agency
Supplemental Testimony, Exhibits, Witness List and Time Estimates**

December 5, 2011

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STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION

| | | |
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| In the Matter of |) | |
| Application for Certification for the |) | Docket No. 07-AFC-6 |
| Carlsbad Energy Center Project |) | |
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| _____ |) | |

**City of Carlsbad and Carlsbad Redevelopment Agency
Supplemental Testimony, Exhibits, Witness List and Time Estimates**

1. Introduction

This Committee issued a document entitled “Notice of Prehearing Conference, Evidentiary Hearing and Committee Conference; Ruling on Motions for Additional Time to File Testimony” on November 29, 2011. In that Notice, this Committee set forth the topics that the Committee will take evidence. These topics include (1) the impacts of the three new PPAs on the cumulative and alternatives analysis, (2) Conditions LAND-2 and LAND-3, their environmental impacts and modifications, (3) Grid reliability issues, (4) the federal PSD permit, (5) recent land use LORS and amendments, and (6) evidence on whether it is appropriate to override unmitigated environmental impacts or noncompliance with state or local LORS. Testimony and exhibits on the above-listed topics are to be filed by 12:00 pm on December 5, 2011. The City of Carlsbad and the Carlsbad Redevelopment Agency (hereafter “Carlsbad”) hereby responds to the Committee directives.

2. Carlsbad Witnesses and Testimony

(a) Alternatives Analysis. Mike Hogan sponsors testimony on the requirements for an adequate analysis of Alternatives. Mr. Hogan concludes that the current alternatives and cumulative analysis are inadequate under CEQA. Joe Garuba

sponsors testimony which evaluates the impacts of the three new SDG&E executed PPA projects (Escondido Repower, Pio Pico and Quail Brush) on the existing alternatives analysis. The testimony determines that the three PPA projects meet most or all of the project objectives. The testimony also conducts a site evaluation comparison and assesses the comparative environmental impacts of the three projects with the CECP. The testimony concludes that the three PPA projects are preferable to the CECP.

- (b) LAND-2 and LAND-3. Mike Hogan sponsors testimony on the adequacy of the Alternatives analysis and Debbie Fountain sponsors testimony on the CECP proposal to eliminate or modify the Land-2 and Land-3 Conditions. CECP advanced three arguments (pages 4-8 of CECP's November 18 filing) which argue that the financial burden of the demolition and remediation of the Encina Power Station ("EPS" should not be borne by the CECP. Carlsbad agrees with CECP and further suggests that the EPS owner should be free to take partners in the redevelopment effort. Ms. Fountain reiterates that these conditions, with real deadlines, along with the type of community benefits offered by the Poseidon Desalination plant (a redevelopment precedent), could satisfy the "extraordinary public purpose" test of the Redevelopment Agency. Ms Fountain offers to negotiate a development agreement with the EPS owner. Finally, Ms Fountain reiterates that Land-2 and Land-3, as proposed by the CECP, add a third power plant on the California Coast and, thus, increases, not decreases blight.
- (c) Grid Reliability. Carlsbad does not have a witness on grid reliability. In Mr. Garuba's testimony on Alternatives, and Mr. Therkelsen's testimony on Override, raise questions regarding the timing of the CECP and its ability to meet grid and regional reliability needs, the concern of the ISO.
- (d) Recent Land Use LORS. Carlsbad City Attorney Ron Ball sponsors testimony clarifying the implications and effects of recently passed Carlsbad resolutions and ordinances. This testimony addresses effective dates of the resolutions and ordinances and the implications for electric generation facilities in the Public Utility zone.

(e) Override. Mr. Therkelsen sponsors testimony on the Energy Commission’s “override” provision. He provides personal experiences and context for applying the override standard for a LORS non-conformance. There is a discussion of how the Commission has viewed various factors in making an override determination and concludes that the CECP attributes do not rise to the level that warrant an override.

3. Exhibit List (attached)

4. Time Estimates The following estimates are provided to the Committee in advance of any rebuttal testimony that may be filed on December 7, 2011. Carlsbad reserves the right to increase these estimates following review of any rebuttal testimony filed.

| <u>Witness</u> | <u>Area</u> | <u>Time Estimate</u> |
|-----------------|-----------------------|----------------------|
| Joe Garuba | Alternatives analysis | 15 minutes |
| Mike Hogan | CEQA Requirements | 10 minutes |
| Debbie Fountain | LAND-2 and LAND-3 | 20 minutes |
| Ron Ball | City LORS | 10 minutes |
| Bob Therkelsen | CEC Override | 20 minutes |

The following are estimates for cross-examination of CEC Staff and CECP witnesses. Please note that Carlsbad does not have any cross examination for the four staff witnesses on Land-2 and Land-3. In our opinion, these witnesses need not testify live.

| <u>Witness</u> | <u>Area</u> | <u>Time Estimates</u> |
|-----------------|--------------------|-----------------------|
| CECP | | |
| Scott Valentino | Land-2 and Land-3 | 20 minutes |
| Brian Theaker | Grid Reliability | 15 minutes |
| Gary Rubenstein | Air quality/PSD | 10 minutes |
| Ron Rouse | City Land Use LORS | 20 minutes |

CEC Staff

| | | |
|---|-----------------------------------|------------|
| David Vidaver | Alternatives | 10 minutes |
| Will Walters | Air quality/PSD | 10 minutes |
| Mike Monasmith Erick Knight Alvin Greenberg Will Walters | Land-2 and Land-3 (environmental) | - 0 - |
| Robert Sparks Dennis Peters | System Reliability | 15 minutes |

12/5/2011

Date

/s/ Ronald R. Ball

RONALD R. BALL
City Attorney for the City of Carlsbad
And General Counsel for Carlsbad
Redevelopment Agency

CECP SUPPLEMENTAL EVIDENTIARY HEARING

**ALTERNATIVES
PREPARED DIRECT TESTIMONY OF JOE GARUBA
CITY OF CARLSBAD**

Q1. Please state your name and position.

A1. My name is Joe Garuba. I am the Municipal Property Manager for the City of Carlsbad.

Q2. What is the purpose of your testimony?

A2. The purpose of my testimony is to provide information on project alternatives as requested by the Assigned Committee. On November 29, the Assigned Committee in this proceeding issued a Notice of Prehearing Conference Evidentiary Hearing and Committee Conference. In that notice the Committee listed the topics on which they would hear testimony. Item 1 reads:

1. "The impact of the three new San Diego Gas & Electric Power Purchase Agreement projects on our cumulative impacts and alternative analysis"

This analysis is intended to summarize project specific information and to compare the benefits and impacts of the three identified projects with the Carlsbad Energy Center Project (CECP).

Q3. Please describe the alternatives considered for this testimony

A3. On May 19, 2011, San Diego Gas & Electric Company filed an application (Exhibit 452) with the California Public Utilities Commission seeking approval of three executed Power Purchase Agreements (PPA). SDG&E has filed testimony supporting these three projects (Exh. 453) and hearings are scheduled for the beginning of 2012, with a final decision expected by spring 2012. The three PPA projects clearly serve as alternatives to the CECP and need to be considered in light of the City's position

that there are significant adverse environmental impacts and LORS violations that would be created by the proposed CECP.

- (a) Escondido Energy Center. This brownfield project is a 45 MW repower project that has a signed power purchase agreement with SDG&E. This project will consist of a single General Electric LM 6000 unit utilizing natural gas fuel. This unit has a rapid response and can go from a cold idle mode to full operation within 10 minutes. The project will be constructed at an existing facility in Escondido and is scheduled to come on-line in 2014. This project was approved by the City of Escondido on July 12, 2011, the time for filing a legal challenge has expired. It is therefore a final action.(Exh 454 , pages 28-32, and 011.Exh 444)

- (b) Pio Pico Energy Center. This brownfield project is a 300 MW project located in the County of San Diego that has a signed power purchase agreement with SDG&E. It has an application pending before the CEC, and was deemed data adequate in April 2011. Based on the November 14, 2011 Revised Schedule, the Preliminary Staff Analysis in expected by the end of December 2011. This project consists of three General Electric LMS 100 units utilizing natural gas fuel. These units have a rapid response and can go from a cold mode to full load within 10 minutes. The proposed project will be located adjacent to the existing Otay Mesa combined cycle power plant and is scheduled to come on-line in 2014. (Exh. 454 pages 32-36)

- (c) Quail Brush. This project is a 100 MW project to be located in the City of San Diego with a signed power purchase agreement with SDG&E. It has an application pending before the CEC, and was deemed data adequate on November 16, 2011. This project consists of eleven 9.1 MW Wartsila 20V34SG reciprocating units utilizing natural gas fuel. These units have a rapid response and can go from a cold mode to full load in 10 minutes and can operate from 50% to 100% load. The proposed project will be located adjacent to the Sycamore Canyon Landfill. It is scheduled to come on-line in 2014. (Exh. 454, pages 36-40)

Q4. Why is this important to the Committee?

- A4. The purpose of my testimony is to identify and evaluate reasonably foreseeable projects that serve as potential alternatives to the proposed project based on the guidance provided by the California Environmental Quality Act (CEQA). I have been informed that CEQA provides the road map for this type of analysis. "An EIR shall describe a range of reasonable alternatives to the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (CEQA Guidelines, section 15126.6 (a). The alternatives considered must include a "No Project" alternative, which compares the environmental effects of the property remaining in its existing state (i.e., the proposed project is not approved) against the environmental effects that would occur if the project were approved. If disapproval of the proposed project would

result in predictable actions by others, such as the proposal of some other project, this consequence should be addressed in the “No Project” discussion. (14 Cal. Code Reg. § 15126.6(e)(3)(B). The “No Project” alternative thus must consider what would be reasonably expected to happen in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services. (14 Cal. Code Reg. § 15126.6(e)(2).

The three projects identified above (Escondido, Pio Pico, and Quail Brush) have been offered PPAs by SDG&E. They either have applications pending with the CEC and are deemed data adequate or, in the case of the Escondido Energy Center, have already received approval from the city hosting the project. Thus, all three should serve as “reasonable alternatives” to the CECP. The three PPAs are currently being reviewed for approval by the California Public Utilities Commission (CPUC), and as the Applicant clearly states:

A PPA is the central document in the development and construction of independent (nonutility owned) power plants and is a critical component to obtaining project financing. (CECP Supplemental Testimony, Page 6, November 18, 2011).

Q5. Describe the significant effects of the CECP project.

A5. It is the City of Carlsbad’s position that construction and operation of the CECP presents significant adverse environmental impacts. These as-yet unmitigated impacts occur in three distinct areas: Land Use, Worker Safety/Fire Protection and the continued use of ocean water for power plant operations. Significant potential negative impacts have also been identified with regard to the visual impact of the proposed CECP because of the inability to provide screening on the east and west sides of the project when the cumulative impacts of Interstate 5 widening, a major sewer line and the forced relocation of the Coastal Rail Trail are taken into account.¹ There has been substantial information entered into this proceeding regarding these issues, so the following is not intended to repeat prior arguments but to merely summarize the main thrust of each.

- a. Based on the official determinations by both the City of Carlsbad City Council and the Carlsbad Housing and Redevelopment Commission, the CECP does not conform to all applicable land use regulations. Most recently, the Carlsbad City Council, on Sept. 27, 2011, unanimously passed Resolution 2011-230, which amended the General Plan’s Public Utilities Land Use designation, and simultaneously passed Ordinance CS-158, which amended the Public Utilities Zone to further define permitted uses. This action makes it clear that power production over 50 MW is only an acceptable land use outside the Coastal Zone. Although the Energy Commission has the power to

¹ CECP FSA, Nov. 12, 2009, p. 4.12-38

“override” local land use regulations, an override does not make this significant LORS violation disappear.

Furthermore, the CECP fails to meet the Carlsbad Housing and Redevelopment Commission requirement that the CECP demonstrate “extraordinary public purpose.” (City of Carlsbad Direct Testimony, January 10, 2010, Fountain p. 5) As reinforced by the Applicant in its November 2011 submittal, the CECP is an addition, not a replacement, to the existing Encina Power Plant, which would exacerbate the existing blighted condition of the site.²

- b. The CECP does not conform to the California Fire Code provisions that are designed to protect workers and firefighting personnel. In June 2011, the Energy Commission named itself as the local fire official for this project (Errata to the PMPD, page 16). As the local fire official, the Energy Commission would not only have the responsibility for establishing design standards, but would also have the responsibility for training, inspection and emergency response. The Energy Commission has not yet explained if it can responsibly fulfill these duties.
- c. The CECP will continue to use ocean water for power plant operations, regardless of whether the Encina Power Station (EPS) complies with a state mandate to reduce the environmental impacts of coastal power plants that employ once through cooling (OTC) in their generation processes. The state adopted an OTC policy in May 2010 requiring coastal power plants to reduce ocean impacts, and EPS is required to comply with this policy by Dec. 31, 2017. The applicant has submitted an implementation plan with the State Water Resources Control Board by which EPS proposes to comply with the policy. However, whether or not EPS complies with the OTC policy, CECP proposes to desalinate and use ocean water in its industrial processes. The significance of the impact of this industrial use on the ocean environment is yet to be determined.
- d. Severe Visual Impact – The cumulative impact of the CECP and the future widening of the Interstate 5 combined with a major sewer line that passes east of the plant, may result in the removal of a berm that supports a line of trees that screen the industrial plant. In addition, CECP’s 140-foot-tall stacks will tower over the freeway, making them difficult to screen even with a line of trees. Without any screening, the site will stand exposed to motorists, residents and visitors.

² Carlsbad Energy Center LLC’s Supplemental Testimony before the CEC, November 18, 2011, p. 7

- e. Coastal Rail Trail – Condition LAND-1 in the Presiding Member’s Proposed Decision would force relocation of the Coastal Rail Trail, a regional transportation link for pedestrians and bicyclists that is currently under development. As written, the condition would require the trail to be relocated west of the railroad tracks, which is not its current route. Setting aside the legal question of whether the Commission can dictate the trail’s location and the City contends it can’t, forcing its relocation could preclude the trail’s development. This unresolved issue thwarts the efforts of the region and represents a potentially significant impact.

Q5. What were the project objectives considered by the CEC Staff in evaluating project alternatives?

A5. The CEC Staff focused its alternatives analysis contained in the FSA (page Alternatives 6-3 and 6-4) on the following project objectives:

1. Meet the expanding need for new, highly efficient, reliable electrical generating resources that are dispatchable by the CAISO (California Independent Systems Operator), and are located in the “load pocket” of the San Diego region;
2. Improve the San Diego regional electrical system reliability through fast starting generating technology, creating a rapid responding resource for peak demand situations, and providing a dependable resource to backup intermittent renewable resources like wind generation and solar;
3. Allow the retirement of existing EPS (Encina Power Station) Units 1, 2, and 3, and assist in the retirement of the South Bay power plant and the eventual retirement of existing EPS Units 4 and 5;
4. Modernize existing aging electrical generation infrastructure in north coastal San Diego County, which includes the retirement of aging once-through cooling (OTC) facilities. Retiring the use of OTC is an objective shared by the energy and environmental agencies in California, including the California Public Utilities Commission (CPUC), California Energy Commission (CEC), CAISO, and publicly owned utilities;
5. Utilize existing infrastructure to accommodate replacement generation and reduce environmental impacts and costs; and
6. Meet the commercial qualifications for long-term power contract opportunities in southern California.

Q6. How do the three PPA projects compare with the CECP in meeting the described objectives?

A6. The following addresses how the projects each meet the project objectives:

- (1) Meets the expanding need for new, highly efficient, reliable generating resources that are dispatchable by the CAISO, and are located in the “load pocket” of the San Diego region.

Based on publicly accessible and project specific information where available, all three SDG&E PPA projects will utilize modern equipment.

Comparisons of the relative project efficiencies are as follows:

| | | |
|-------------|----------------|---------------------------|
| CECP | 8,000 Btu/kWhr | (CECP AFC, p.2-34) |
| Pio Pico | 7,894 Btu/kWhr | (Pio Pico AFC, p. 3-10) |
| Quail Brush | 8,834 Btu/kWhr | (Quail Brush AFC, p. 2-6) |
| Escondido | 8,348 Btu/kWhr | (GEaviation.com) |

The reliability of each alternative generating system is as follows:

| | | |
|-------------|--------------|---------------------------|
| CECP | 92%-98% | (AFC, p. 2-28) |
| Pio Pico | 92%-98% | (Pio Pico AFC, p. 3-52) |
| Quail Brush | 98% (summer) | (Quail Brush AFC, p. 2-6) |
| Escondido | 99.7% | (GEaviation.com) |

Each of the projects is located in the SDG&E “load pocket” and once operational would be available for dispatch by CAISO

Location of the projects (all located in SDG&E service territory):

| | | |
|-------------|--------------------------|-------------------|
| CECP | Coastal San Diego County | |
| Pio Pico | Otay Mesa | (Exh. 454, p. 31) |
| Quail Brush | Sycamore Canyon | (Exh. 454, p. 37) |
| Escondido | Escondido | (Exh. 454, p. 28) |

- (2) Improves San Diego regional electrical system reliability through fast starting generating technology, creating a rapid responding resource for peak demand situations, and providing a dependable resource to back up intermittent renewable resources like wind generation and solar.

CECP – As identified by the applicant in its November 2011 filing, the CECP does not have a PPA at this time, so it fails to meet this objective.

Pio Pico, Quail Brush and Escondido have entered into PPAs with SDG&E:

“Each of the three subject contracts are for environmentally friendly, quick start generation units utilizing the most advanced and efficient gas-fired technologies. They also provide the starting and/or ramping capabilities required by the Commission to accommodate sudden changes in resources or load. Further, these generation facilities provide flexibility that will help to mitigate the effects of intermittency associated with the increased deployment of renewable generation. In addition, each of these facilities will provide reliable capacity during periods of peak loads.” (Exh. 454, page 5)

- (3) Allows the retirement of existing EPS Units 1, 2, and 3, and assists in the retirement of the South Bay power plant and the eventual retirement of existing EPS Units 4 and 5.

South Bay has already been retired so this benefit is moot.

As a condition of the San Diego Air Pollution Control District, the applicant is required to retire EPS units 1-3 when the CECP commences operation due to the need to utilize EPS's existing air credits. With regard to the exiting EPS, retirement does not equal removal, so the existing EPS facility would remain intact until the proposed Land Use 3 condition is triggered at some point in the future. Additionally, the CECP needs to obtain approval by the EPA for compliance with air quality regulations and the San Diego Regional Water Quality Control Board for its continued use of ocean water for plant operations. Including the two-year construction time period as identified by the Applicant, the earliest units 1-3 could be retired would be in 2015.

Based on SDG&E's submittals to the CPUC, it appears that the three SDG&E PPAs offer the clearest opportunity to ultimately retire *all* the existing EPS units.

“For this Application, SDG&E recommends that the Commission assess not only SDG&E's need in 2015 but also through 2018 on the reasonable assumption that the Encina Power Plant will be retired *in full* at the end of 2017. SDG&E assumes the retirement of Encina units 1, 2 and 3, representing a total of 320 MW by 2013, with the remaining capacity to be retired in 2017.” (Exh. 454, page 10, emphasis added)

- (4) Modernize existing aging electrical generation infrastructure in north coastal San Diego County, which includes the retirement of aging once-through cooling (OTC) facilities. Retiring the use of OTC is an objective shared by the energy and environmental agencies in California, including the California Public Utilities Commission (CPUC), California Energy Commission (CEC), CAISO, and publicly owned utilities.

The retirement or upgrade of existing power plants utilizing once-through-cooling is discussed in (3) above. With regard to modernization of aging electrical generation infrastructure, SDG&E selected three bids in its 2009 Request For Offers with the oversight of a CPUC appointed representative; SDG&E selected the three projects that best fit SDG&E's needs and the San Diego region's energy requirements. The CECP was not selected.³ Without securing a PPA, the construction of the CECP is questionable, and as such, the ability to meet the project objective is in doubt. Thus, the CECP fails to meet this objective at this time.

- (5) Utilize existing infrastructure to accommodate replacement generation and reduce environmental impacts and costs.

³ Exh. 454, page 42

The CECP will utilize some existing infrastructure, but will have to construct an ocean water desalination plant and a new substation.

The Escondido Energy Center project is a repower of an existing generation unit designed to make the plant more efficient. The plant is located in an industrial zone on previously disturbed land, and was granted a Conditional Use Permit by the Escondido Planning Commission on July 12, 2011. It does not require a CEC license. It is adjacent to an existing switchyard and transmission line, and has water and a natural gas line on site. The rebuilt plant expects to be operational in 2014.

The Pio Pico facility is located on previously disturbed lands adjacent to the existing Otay Mesa power plant. It will utilize an existing switchyard and natural gas fuel line.

The Quail Brush facility will be constructed on previously disturbed lands adjacent to the Sycamore Canyon Landfill.

- (6) Meet the commercial qualifications for long-term power contract opportunities in southern California.

The CECP does not have a PPA so it fails to meet this project objective.

It has to be assumed that the three SDG&E PPA projects meet this objective, because signed contracts are the best evidence of projects that meet qualifications for long-term power contracts. Contract term lengths are as follows:

| | |
|-------------|----------------------------|
| Pio Pico | 20 years (Exh. 453, p. 33) |
| Quail Brush | 20 years (Exh. 453, p. 37) |
| Escondido | 25 years (Exh. 453, p. 29) |

Table 1 (below) condenses the assessment in graphic form of the proposed project and the PPA alternatives in achieving stated project objectives.

**Table 1
COMPARISON OF CECP AND SDG&E PPA PROJECTS
WITH CEC IDENTIFIED PROJECT OBJECTIVES**

| Project Objective | CECP⁴ | Pio Pico⁵ | Quail Brush⁶ | Escondido⁷ |
|-------------------------------------|-------------------------|-----------------------------|--------------------------------|------------------------------|
| 1a. New, highly efficient, reliable | YES | YES | YES | YES |
| 1b. Dispatchable | YES | YES | YES | YES |

⁴ Source: CEC Staff Final Staff Assessment

⁵ Source: Testimony of Maurene Bishop, Exh. 453

⁶ Source: Testimony of Brad Mantz, Exh. 453

⁷ Source: Testimony of Thomas C. Saile, Exh. 453

| | | | | |
|-------------------------------------|--|-----------------------------|-----------------------------|-----------------------------|
| 1c. In San Diego Load Pocket | YES | YES | YES | YES |
| 2a. Fast starting | YES | YES | YES | YES |
| 2b. Rapid response for peak demand | YES | YES | YES | YES |
| 2c. Back-up intermittent renewables | YES | YES | YES | YES |
| 3. Allow retirement of EPS 1-3 | YES | YES | YES | YES |
| 4. Retire aging OTC facilities | Partially. Continues use of ocean water for power plant operations | YES | YES | YES |
| 5. Use existing infrastructure | YES | YES | YES | YES |
| 6. Long-term power contract | NO - not selected in procurement | YES – pending CPUC approval | YES – pending CPUC approval | YES – pending CPUC approval |

Q7 How would you compare the CECP and the PPA projects in terms of meeting the project objectives?

A7. According to material submitted by SDG&E and project applicants, the PPA projects meet all of the project objectives adopted by the CEC staff. Many of these objectives are regional in nature and serve the needs of SDG&E’s load pocket. The CECP, however, was not selected by SDG&E through its procurement process and has not been offered a long-term power contract by SDG&E or, to my knowledge, any other Southern California utility. Consequently, to date, the CECP is not able to fully meet the CEC Staff’s stated project objectives.

Q8. What was the method the CEC staff used to compare project alternatives?

A8. In its FSA, the CEC Staff evaluated alternative sites according to the following criteria (FSA, page Alternatives 6-4):

1. Site suitability, including size (at least 23 acres are required for the power plant equipment, plus laydown and construction set-aside space);
2. Availability of infrastructure – the site should be within a reasonable distance of transmission, natural gas and water supply networks, as well as immediately accessible by roads capable of transporting large equipment and supplies;
3. Location that precludes significant noise, public health, and/or visual impacts to

- adjacent residential areas or sensitive receptors (such as day care centers, nursing homes, schools, and public recreation areas);
4. Compliance with local land use and zoning designations;
 5. Site control – the site should be void of any site encumbrances (physical or administrative obstructions to long-term use of property) and should be available for sale or long-term lease; and
 6. Attainment of basic project objectives.

Q9. How do the CECP and PPA projects compare in terms of the CEC Staff's alternative site evaluation criteria?

A9. Using the CEC Staff's evaluation criteria, I evaluated the CECP and the PPA projects. The comparison is shown in Table 2.

**Table 2
COMPARISON OF CECP AND SDG&E PPA PROJECTS
WITH CEC ALTERNATIVE SITE EVALUATION CRITERIA**

| Evaluation Criteria | CECP⁸ | Pio Pico⁹ | Quail Brush¹⁰ | Escondido¹¹ |
|------------------------------------|--|---|---|---|
| 1. Site suitability including size | 23 acre parcel bordered by Interstate 5 freeway, lagoon, and railroad corridor. Approximately 8 acres used for plant operations City contends that site is severely constrained¹² | 10 acres with no identified access concerns | 21.6 acres with no identified access concerns | 1.67 acres with no identified access concerns. Project approved by City of Escondido. |
| 2a. Distance to transmission | 150 feet | 1,700 feet | 1 mile | 150 feet |
| 2b. Distance to natural gas | 1,100 feet | 8,000 to 10,000 feet | 2,200 feet | On site |
| 2c. Distance to | Uses ocean water | Adjacent to | Nearby | On site |

⁸ Source: CEC Staff Final Staff Assessment unless otherwise noted

⁹ Source: Pio Pico Application for Certification A2011-AFC-1, unless otherwise noted

¹⁰ Source: Quail Brush Application for Certification A2011-AFC-3, unless otherwise noted

¹¹ Source: Exh. 454, Exh. 454 [File No. PHG 11-0005]

¹² Source: Testimony of City of Carlsbad Fire Chief Kevin Crawford, January 4, 2010

| | | | | |
|--|---|-----------------------------------|---|---|
| water | | site | | |
| 2d. Immediate access | City: Limited access due to constrained location | No access issues identified | No access issues identified | No access issues identified |
| 3a. Distance to residents | .3 miles | .9 miles | .3 miles | 0.3 miles |
| 3b. Distance to sensitive receptors | 0.5 miles | .9 miles | .3 miles | Unspecified |
| 4. Compliance with local land use and zoning | CEC Staff: Undetermined City: NO – Redevelopment: NO ¹³ | Yes. Specific Plan unlimited uses | No. Needs land use amendments or CEC override | Yes. Located in industrial zone. Project granted City approval. |
| 5. Site control | Yes | Yes | Yes | Yes |
| 6. Attainment of basic project objectives | NO – not selected in SDG&E procurement | YES – pending CPUC approval | YES – pending CPUC approval | YES – pending CPUC approval |
| | | | | |

Q10. How do the CECP and PPA projects compare in terms of the potential environmental consequences?

A10. In the FSA, the CEC Staff presented a brief “comparative analysis of impacts” discussing the potential environmental issues and impacts of the proposed alternative sites within the City of Carlsbad and provided a matrix summarizing their results in comparison with the CECP (FSA, pages 6-12 to 6-14). In contrast, the CEC Staff only evaluated the air quality and greenhouse gas emissions of the PPA projects.

Consistent with the approach used by the CEC Staff in the FSA, Table 3 compares the potential environmental impacts of the PPA projects with the CECP.

**Table 3
COMPARISON OF CECP AND SDG&E PPA PROJECTS
FOR POTENTIAL ENVIRONMENTAL IMPACTS¹⁴**

| Issue Area | CECP ¹⁵ | Pio Pico ¹⁶ | Quail Brush ¹⁷ | Escondido ¹⁸ |
|------------|--------------------|------------------------|---------------------------|-------------------------|
|------------|--------------------|------------------------|---------------------------|-------------------------|

¹³ Source: Evidentiary Hearing, Testimony of Murray Kane, Feb. 1, 2010, p. 144-146

¹⁴ Gray shaded areas indicate environmental impacts less than CECP; red shaded areas indicate impacts greater than CECP

¹⁵ Source: CEC Staff Final Staff Assessment unless otherwise noted

¹⁶ Source: Pio Pico Application for Certification unless otherwise noted

| | | | | |
|----------------------------|--|--|--|--|
| Air Quality/Public Health | Requires EPA review. Uncertain what impacts may be required. | Similar to CECP. | Less than CECP. Only 3800 hours of operation per year and construction only 14 months | Less than CECP. Plant will operate up to 2600 hours per year. Reduces emissions 3-to-69 percent from current plant. |
| Land Use/Site Control | CEC Staff: CECP may not conform City: Non conformance with LORS, including Coastal Act¹⁹ Redevelopment Commission: Nonconformance with LORS | Less than CECP. Adjacent to existing power plant. No apparent LORS issues. | Similar to CECP. Project will need land use amendments; not in the Coastal Zone | Less than CECP. Project approved by City of Escondido July 21, 2011. |
| Biological Resources | No significant unmitigated impact currently. Potential significant impact once EPS is retired. CECP is required to amend project once EPS retires per FSA pg. 4.9-23 | Similar to CECP. Use of previously graded property. No potential impact to ocean environment. | Similar to CECP. Project on disturbed lands associated with landfill. No potential impact to ocean environment. | Similar to CECP. Brownfield project on disturbed land. No impacts. |
| Traffic and Transportation | CEC Staff: Impacts mitigable through conditions. | Similar to CECP. LOS levels similar, but shorter construction timetable and lower workforce | Similar or less than CECP. Lower construction workforce and shorter construction timetable | Similar to CECP. No significant impact during construction. Site will be remotely operated. |
| Noise | No significant | Similar to | Similar to | Similar to |

¹⁷ Source: Quail Brush Application for Certification, unless otherwise noted

¹⁸ Source: City of Escondido Staff Report to Planning Commission, July 12, 2011 [File No. PHG 11-0005]

¹⁹ Source: Exh. 420,

| | impacts | CECP. | CECP. | CECP. |
|-----------------------------------|---|--|---|--|
| Waste Management | No significant impacts | Similar to CECP | Similar to CECP | Similar to CECP |
| Water Resources | Potential Significant Impact. Proposed desalination continues use of ocean water for power plant operations. CECP is required to amend project once EPS retires per FSA pg. 4.9-2 | Less than CECP. Use of fresh water to be replaced by reclaimed water | Less than CECP. Uses potable water, but only 1.5 AFY | Less than CECP. Project already connected. |
| Visual Resources | CEC Staff: Severe visual impact. May be mitigable, however, project conditions have not yet been required. | Less than CECP. Closest residence is 4,700 feet distant and site is obscured from nearest residences. | Less than CECP. Project located next to landfill. Impacts from nearby viewpoints evaluated as less than significant and insignificant. | Less than CECP. Stack height under 60 feet. Surrounded by light and heavy industry. |
| Transmission Line Construction | No significant impacts | Greater than CECP. New 1,700 foot transmission connection required | Greater than CECP. Two alternatives at distances of 4,800 feet and 1.5 miles | Similar to CECP |
| Worker Safety and Fire Protection | Potential Significant Impact. PMPD Errata proposes that CEC assume role of local fire official. to avoid override City: Insufficient access; plant's location in a pit and between rail and freeway | Less than CECP. No issues identified | Less than CECP. No issues identified. | Less than CECP. No issues identified. Project approved by City of Escondido. |

| | | | | |
|--|--|--|--|--|
| | <p>present significant public safety concern²⁰</p> | | | |
|--|--|--|--|--|

Q11. What is your conclusion in terms of comparing the CECP and PPA projects with respect to the CEC Staffs alternative site evaluation criteria and potential environmental consequences?

A11. Based on the method used by the CEC Staff in their prior evaluation of project alternatives, I conclude that each of the three alternatives is preferable to CECP.

A critical concern with respect to the evaluation criteria is attainment of the basic project objectives which can only be achieved realistically through securing a long-term power contract. Although the CECP competed in the SDG&E procurement process and has previously sought a long-term contract from SDG&E, it was not selected and consequently has not received a long-term contract offer. As David Vidaver, a CEC expert, pointed out “If San Diego Gas & Electric has said that it does not intend on entering into a power purchase agreement with a generator in the northern part of the county because it doesn't feel it's necessary, I would assume—I would conclude from that that San Diego doesn't feel it's necessary.”²¹

Regarding the assessment of potential environmental impacts, Table 3 clearly identifies that the CECP presents equal, if not greater, environmental impacts. This is based on the CECP’s

- Location within the coastal zone,
- Proximity to a railroad, lagoon and heavily traveled freeway, continued use of ocean-water for plant operations,
- Non-conformance with Land Use LORS
- Non-conformance with Public Safety LORS, and
- Severe visual impacts attributed to the project

Q12. What is your overall conclusion regarding the suitability of the three PPA projects in comparison to the CECP?

A12. My conclusion is that SDG&E, as the regional planner for San Diego’s energy needs, is the responsible entity for determining what the region’s needs are. SDG&E’s selection of other projects in lieu of the CECP confirms the City’s contention that the CECP is unnecessary. Over the past several years SDG&E has moved forward and provided a clear signal that it does not need another coastal power plant and that other, more viable alternatives exist that better meet the requirements of the region.

²⁰ Source: Testimony of City of Carlsbad Fire Chief Kevin Crawford, January 4, 2010

²¹ Evidentiary Hearing, Testimony of David Vidaver, Feb. 3, 2010, p. 341

**PREPARED DIRECT TESTIMONY
OF
MICHAEL M. HOGAN, ESQ.
HOGAN GUINEY DICK LLP
SPECIAL COUNSEL
THE CITY OF CARLSBAD**

Q.1 Please state your name and employment.

A.1 My name is Michael Hogan and I am currently a partner in the law firm Hogan Guiney Dick LLP, which is located at 225 Broadway, Suite 1900, San Diego, California. My firm serves as special counsel to the City of Carlsbad and has provided legal services concerning compliance with the California Environmental Quality Act (CEQA).

Q.2 How long have you held this position?

A.2 I have been employed by Hogan Guiney Dick LLP for 16 years, since October 1995. For fifteen years before that, I was a partner and associate with the law firm Gray Cary Ware & Freidenrich (now DLA Piper) in San Diego, California. I have been a member of the bar admitted to practice law in the State of California since 1980.

Q.3 What is your expertise with the California Environmental Quality Act?

A.3 I have been an attorney practicing land use and CEQA law for over 30 years. Since 1980, I have represented public agencies property owners and organizations in CEQA matters involving a wide variety of public and private projects, including port facilities, cruise ship terminals, interstate highways, high speed rail projects, landfills and hazardous waste disposal facilities, hotels, casinos, and virtually every type of residential, commercial and industrial development. I have successfully prosecuted and defended scores of CEQA lawsuits in both the trial and appellate courts. Over the past 15 years, my practice has been devoted exclusively to the representation of public agencies. Presently, my firm serves as special counsel to eight cities, counties and special districts in Southern California and the Central Valley, providing legal assistance in the preparation of the environmental documents required by CEQA and in litigation concerning those documents.

Q.4 What is the purpose of your testimony in this proceeding?

A.4 The Committee's Revised Scheduling Order of November 9, 2011, identified the impact of the three new PPA projects on the cumulative impacts and alternatives analysis as one of the topics on which additional evidence and argument will be accepted. The purpose of my testimony is to discuss the impact of the three projects for which SDG&E has entered into Power Purchase Agreements ("PPAs"), including the Pio Pico Energy Center, Escondido Energy Center and Quail Brush Power

(collectively “PPA Projects”), on the analysis of project alternatives and cumulative impacts for the proposed Carlsbad Energy Center Project (“Proposed Project”). My testimony also is intended to suggest ways in which the analysis of cumulative impacts and the “No Project” Alternative can be modified to comply with the requirements of CEQA.

Q.5 Will you please summarize the key points of your testimony?

A.5 Yes. The key points of my testimony are:

- The analysis of alternatives to the Proposed Project does not comply with the requirements of CEQA because:
 - It failed to include the PPA Projects in its evaluation of the “No Project” Alternative with respect to what would reasonably be expected to happen in the foreseeable future if the Proposed Project is not approved; and
 - It failed to consider whether the project alternatives, including the “No Project” Alternative, would avoid or substantially lessen *any* of the Proposed Project’s significant impacts, not just those which are unmitigable.
- The analysis of the cumulative impacts of the Proposed Project does not comply with the requirements of CEQA because:
 - It failed to include the PPA Projects as “probable future projects” on the list of cumulative projects considered.

Q.6 Is the Energy Commission required to consider the “No Project” Alternative?

A.6 Yes. Power plant site certification proceedings under Chapter 6 of the Warren-Alquist Act are considered a certified regulatory program under CEQA. (Pub. Res. Code ' 21080.5; 14 Cal. Code Reg. ' 15251(j).) The environmental documents prepared by a certified regulatory program may be used in place of an environmental impact report (“EIR”) that otherwise would be required for a project. (Pub. Res. Code ' 21080.5(a); 14 Cal. Code Reg. ' 15250; *Californians for Alternatives to Toxics v. Cal. Dept. Of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1067.) These environmental documents are considered the functional equivalent of an EIR. (*Citizens for Non-Toxic Pest Control v. Dept. of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1586.) An EIR must analyze alternatives to a proposed project and the analysis must include an evaluation of the “No Project” alternative. (14 Cal. Code Reg. ' 15126.6(e).) Accordingly, the Energy Commission must consider alternatives

to the proposed project, including the “No Project” Alternative, under both CEQA and the Warren-Alquist Act. (20 Cal. Code Reg., Appendix B, subdiv. Af.)

Q.7 What are the requirements for an adequate analysis of the “No Project” Alternative?

A.7 The purpose of the “No Project” Alternative is to allow the public and the decision-makers to compare the impacts of approving a proposed project with the impacts of not approving the project. (14 Cal. Code Reg. § 15126.6(e)(1).) If a proposed project involves development on an identifiable property, the “No Project” Alternative is the circumstance under which the proposed project does not proceed. The discussion of the “No Project” Alternative must compare the environmental effects of the property remaining in its existing state (i.e., the proposed project is not approved) against the environmental effects that would occur if the project were approved. If disapproval of the proposed project would result in predictable actions by others, such as the proposal of some other project, this consequence should be addressed in the “No Project” discussion. (14 Cal. Code Reg. § 15126.6(e)(3)(B).

CEQA thus requires the analysis of the “No Project” Alternative to discuss the existing conditions at the time the environmental analysis is commenced, as well as what would be reasonably expected to happen in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services. (14 Cal. Code Reg. § 15126.6(e)(2).)

Q.8 Have you formed an opinion regarding whether the analysis of alternatives to the Proposed Project adequately addressed the “No Project” Alternative in this case?

A.8 Yes.

Q.9 What is your opinion?

A.9 The analysis of alternatives at this point in the proceedings does not adequately address the “No Project” Alternative in the manner required by CEQA.

Q.10 What is the basis for your opinion?

A.10 In evaluating the “No Project” Alternative, CEQA requires a lead agency to compare what would happen if a proposed project is approved with what would happen if the project were not approved. If disapproval of a project would result in

predictable actions by others, such as the proposal of some other project, this consequence should be discussed in the “No Project” analysis. (14 Cal. Code Reg. § 15126.6(e)(3)(B).) The lead agency then should analyze the impacts of the “No Project” alternative “by projecting what reasonably may be expected to happen in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.” (14 Cal. Code Reg. § 15126.6(e)(3)(C).)

The Committee has taken official notice of SDG&E’s plans to enter into PPAs for three separate power plant projects in the San Diego area totaling approximately 450 MW and SDG&E’s application to the California Public Utilities Commission for approval of the PPAs. Under CEQA, therefore, the Committee is required to consider what would reasonably be expected to happen in the foreseeable future, based on SDG&E’s having entered into PPAs with the PPA Projects, if the Proposed Project were not approved.

The Errata to the Presiding Member’s Proposed Decision (“Errata”) appears to expressly exclude the PPA Projects from consideration because “[t]he PPA candidate power plants do not presently exist.” (Errata, p. 31.) However, CEQA does not require other projects to “presently exist” in order to be included in the evaluation of the “No Project” Alternative. Instead, CEQA assumes that the environmental review of a proposed project necessarily involves some degree of forecasting and requires a lead agency to use its best efforts to find out and disclose all that it reasonably can. (14 Cal. Code Reg. § 15144.) With respect to alternatives, CEQA specifically requires the Energy Commission to analyze the impacts of the “No Project” Alternative “by *projecting what would reasonably be expected to occur* in the foreseeable future if the project were not approved, *based on current plans* and consistent with available infrastructure and community services.” [Emphasis added.] (14 Cal. Code Reg. § 15126.6(e)(3)(C).) The failure to project what could reasonably be expected to occur, based on SDG&E’s current plans for the PPA Projects, violates CEQA.

Q.11 In your opinion, would consideration of the PPA Projects affect the analysis regarding the “No Project” Alternative in this case?

A.11 Yes. In most other cases, although it is considered the environmentally superior alternative, the “No Project” Alternative is rejected as “infeasible” because it will not achieve any of the objectives of a proposed project. Here, however, including the PPA Projects in the analysis of the “No Project” Alternative would lead to a different conclusion. Had it considered what would reasonably be expected to happen in the foreseeable future if the Proposed Project were not approved, based on SDG&E’s current plans for the PPA Projects, the alternatives analysis would have found that

the “No Project” Alternative would attain most, if not all, of the project objectives (e.g, facilitate the retirement of Encina Units 1-3, use existing infrastructure, eliminate daily need for millions of gallons of ocean water for OTC, interconnect to SDG&E electricity system, provide employment for skilled labor in San Diego region) and therefore would be a feasible alternative to the Proposed Project.

Q.12 Does the alternatives analysis at this point in the proceedings fail to comply with CEQA’s requirements regarding the “No Project” Alternative in any other way?

A.12 Yes. CEQA explicitly requires a lead agency to consider alternatives which “would avoid or substantially lessen *any* significant effects of the project.” [Emphasis added.] (14 Cal. Code Reg. § 15126.6(a), (b), (c), (f); *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 546-547.) However, a common error made by lead agencies is to consider only the *unmitigated* or *unavoidable* significant impacts of a proposed project in the alternatives analysis.

In Alternatives Finding 5, the Errata states: “No alternative, including the “no project” alternative would avoid or substantially lessen potentially significant environmental impacts *since no significant unmitigable impacts have been established.*” [Emphasis added.] (Errata, p. 2.) This finding presumably is based on the FSA’s discussion of alternatives which, rather than listing the Proposed Projects significant impacts and identifying a reasonable range of alternatives that could avoid or substantially lessen any of them, simply declared the project would have no *unmitigated* significant impacts. (FSA, pp. 6-4, 6-22 [Staff’s environmental analysis has not identified any environmental impacts from the CECP that are significant in a CEQA context and cannot be mitigated to a level that is less than significant.].) As a result, the analysis at this point in the proceedings does not comply with CEQA because it has not considered whether the alternatives, including the “No Project” Alternative, would avoid or reduce *any* of the significant impacts of the Proposed Project.

The Proposed Project will have numerous significant impacts which have not been considered in the analysis regarding alternatives. In virtually every resource area, the FSA identified direct and/or cumulative impacts which require conditions of certification in order to be reduced to a level below significance. (*See, e.g.*, FSA, pp. 4.1-59 [air quality], 4.2-8, 4.2-13 [biological resources], 4.3-16, 4.3-19 [cultural resources], 4.4-19 [hazardous materials management], 4.6-18 [noise], 4.9-27 (soils & water resources), 4.10-22 [traffic & transportation], 4.12-38 [visual resources], 4.13-17 [waste management].) The Committee must consider these significant impacts in its findings regarding alternatives, including the “No Project” Alternative, even if they can be mitigated by the proposed conditions of certification. (*Kings*

County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 732.)

By rejecting alternatives, including the “No Project” Alternative, because the Proposed Project will have no *unmitigable* significant impacts, the analysis of alternatives fails to comply with CEQA’s mandate to consider alternatives or alternative locations which could avoid or substantially lessen *any* of the significant impacts of the Proposed Project.

Q.13 Can the inadequacy of the analysis of alternatives be remedied?

A.13 Yes. The inadequacy of the analysis of alternatives, including the “No Project” alternative, can be remedied by revising it (i) to address a “No Project” Alternative which considers what can reasonably be expected to happen if the Proposed Project CECP is not approved, based on SDG&E’s having entered into PPAs with the PPA Projects, and (ii) to consider alternatives and alternative locations, including the “No Project” Alternative, which would avoid or substantially lessen *any* of the significant impacts of the Proposed Project.

Q.14 Is the Energy Commission required to consider the cumulative impacts of the Proposed Project?

A.14 Yes. Power plant site certification proceedings under Chapter 6 of the Warren-Alquist Act are considered a certified regulatory program under CEQA. (Pub. Res. Code ' 21080.5; 14 Cal. Code Reg. ' 15251(j).) The environmental documents prepared pursuant to a certified regulatory program may be used in place of an environmental impact report (“EIR”) that otherwise would be required for a project. (Pub. Res. Code ' 21080.5(a); 14 Cal. Code Reg. ' 15250; *Californians for Alternatives to Toxics v. Cal. Dept. Of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1067.) These environmental documents are considered the functional equivalent of an EIR. (*Citizens for Non-Toxic Pest Control v. Dept. of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1586.) CEQA requires an EIR to analyze the cumulative impacts of a proposed project. (14 Cal. Code Reg.'15130.) Accordingly, the Energy Commission must consider the CECP’s cumulative impacts on the environment under both CEQA and the Warren-Alquist Act. (20 Cal. Code Reg., Appendix B, subdiv. Ag.)

Q.15 What are the requirements for an adequate analysis of the cumulative impacts of a proposed project?

A.15 A “cumulative impact” is an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts. (14 Cal. Code Reg. § 15130(a)(1).) Cumulative impacts thus refer to the change in the environment which results from the incremental impact of a proposed

project when added to other closely related past, present and reasonably foreseeable probable future projects. (14 Cal. Code Reg. § 15355(b).)

The following elements are required by CEQA for an adequate discussion of cumulative impacts:

- First, the environmental document must provide either (a) a list of cumulative projects, which includes all past, present and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or (b) a summary of projections contained in an adopted planning document which describes or evaluates regional or area-wide conditions contributing to the cumulative impact;
- Second, when utilizing a list of cumulative projects, the agency should consider the nature of each environmental resource being examined, the location of the project and its type when determining whether to include a related project on the list;
- Third, the agency should define the geographic scope of the area affected by the cumulative impact and provide a reasonable explanation for the geographic limitation used;
- Fourth, the environmental document must include a summary of the expected environmental effects to be produced by the cumulative projects, with specific reference to additional information stating where that information is available; and
- Fifth, the environmental document must provide a reasonable analysis of the cumulative impacts of the relevant projects in which the assumptions and conclusions are supported by scientific data or other empirical evidence.
(14 Cal. Code Reg. § 15130(b)(1)-(5).)

Q.16 Have you formed an opinion regarding whether the analysis of the Proposed Project's cumulative impacts complies with the requirements of CEQA?

A.16 Yes.

Q.17 What is your opinion?

A.17 The analysis at this point in the proceedings does not address the cumulative impacts of the Proposed Project in the manner required by CEQA because it fails to include the PPA Projects as "probable future projects" on the list of cumulative projects considered.

Q.18 What is the basis for your opinion?

A.18 In evaluating cumulative impacts, CEQA allows a lead agency to use either a “list of past, present, and probable future projects producing related or cumulative impacts, including projects outside the control of the lead agency, or a summary of projections in an adopted plan or related planning document which describes or evaluates the conditions contributing to cumulative impacts. (14 Cal. Code Reg. § 15130(b)(1).) Where a lead agency uses the “list of projects” approach, CEQA requires the list to include all past, present and reasonably foreseeable probable future projects that may have related environmental effects. (14 Cal. Code Reg. §§ 15130(b)(1)(A), 15355.)

The test for determining whether a development proposal has reached the stage where it should be considered a “probable future project” and included on the list of cumulative projects is whether the project has submitted an application for approval. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74-75.) A project that has begun the application process must be included on the list of cumulative projects even though its environmental review or approval process is in its early stages or is expected to be lengthy. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 870.) In compiling the list of projects, the lead agency also should consider the nature of the resource affected and the location and type of project under review. (14 Cal. Code Reg. § 15130(b)(2).) For example, where air quality impacts are concerned, the discussion of cumulative impacts of a proposed energy facility requires consideration of other projects throughout the air basin. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721.)

The analysis of the Proposed Project’s potential cumulative impacts in the FSA used the “list of cumulative projects” approach. Although the list of projects considered in the FSA did not include the PPA Projects, the Committee subsequently took official notice of the fact that SDG&E has submitted applications to the California Public Utilities Commission (“CPUC”) for approval of PPAs for three separate power plant projects in the San Diego area totaling approximately 450 MW. However, the Errata to the PMPD appears to dismiss consideration of the PPA Projects because “[t]he PPA candidate power plants do not presently exist” and “the construction and operation of the three plants with which SDG&E has entered into a power purchase agreement are far from certain.” (Errata, pp. 31-32.) This conclusion reflects a misunderstanding of CEQA’s requirements for determining which projects with related impacts should be included on the list of cumulative projects.

CEQA does limit cumulative projects to those which “presently exist.” Instead, CEQA requires the analysis of cumulative impacts to include not only past and present projects, but also all other “reasonably foreseeable probable future projects” with related impacts. “Probable future projects” include those projects for which an application for approval has been submitted, including projects outside the

jurisdiction of the lead agency, even if their environmental review or approval process is in its early stages or is expected to be lengthy.

There is no dispute that SDG&E has submitted an application to the CPUC for approval of PPAs for all three PPA Projects and that Pio Pico and Quail Brush have submitted applications for certification to the Energy Commission which have been found data adequate. These facts are clearly sufficient to qualify the PPA Projects as cumulative projects under CEQA. Any future project for which the applicant has devoted significant time and resources to prepare for regulatory review should be considered as a “probable future project” for purposes of cumulative impact analysis. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-1128.) A refusal to consider the PPA Projects because of uncertainty as to whether they ultimately will receive permits, or will be financed or constructed, or will be approved by the CPUC, would violate CEQA. This is especially true in light of the fact that the same concerns apply to the Proposed Project.

A discussion of cumulative impacts is only as good as the list of projects it uses. (Kotska and Zischke, *Practice Under The California Environmental Quality Act* (2d ed. 2009), § 13.41, p. 650.) When relevant projects are omitted from the list of cumulative projects, the type and severity of potential cumulative impacts will be understated and the analysis of cumulative impacts will be inadequate. (*Bakersfield Citizens for Local Control* (2004) 124 Cal.App.4th 1184, 1214-1218; *Friends of the Eel River, supra*, 108 Cal.App.4th at p. 868; *San Joaquin Raptor/Wildlife Rescue Center v, County of Stanislaus* (1994) 27 Cal.App.4th 713, 739-741; *Kings County Farm Bureau, supra*, 221 Cal.App.3d at pp. 721-724.)

The analysis of cumulative impacts is not complete because it omits the PPA Projects from the list of cumulative projects. These projects satisfy CEQA’s requirements for inclusion in the analysis of cumulative impacts as reasonably foreseeable probable future projects because they have commenced regulatory review, they are within the geographic scope of the affected area, they are located in the same air basin as the Proposed Project site, and their potential impacts on the environment are closely related to the impacts the Proposed Project. Accordingly, the analysis of cumulative impacts at this point in the proceedings does not comply with CEQA.

Q.19 In your opinion, would the inclusion of the PPA Projects affect the analysis of cumulative impacts in this case?

A.19 Yes. The PPA Projects consist of three separate power plant projects in the San Diego area totaling approximately 450 MW. Their inclusion on the list of cumulative projects obviously would affect the analysis of the Proposed Project’s cumulative impacts on air quality and greenhouse gas emissions because they are located in the same air basin. A thorough review of the PPA Projects’ potential impacts on other

resource areas is needed to determine the extent to which they would contribute to the Proposed Project's cumulative impacts. Such review is essential to ensuring that the public and the decision-makers are fully informed of the potential cumulative impacts of the Proposed Project.

Q.20 Can the inadequacy of the analysis of cumulative impacts be remedied?

A.20 Yes. The inadequacy of the analysis of cumulative impacts can be remedied by revising it to include the PPA Projects as "probable future projects" on the list of cumulative projects and by conducting a thorough review of the nature and significance of the cumulative impacts of the Proposed Project and all other past, present and probable future projects with related impacts.

CECP SUPPLEMENTAL EVIDENTIARY HEARING

**LAND-2 and LAND-3
PREPARED DIRECT TESTIMONY OF DEBBIE FOUNTAIN
CITY OF CARLSBAD**

Q1. Please state your name and position.

A1. My name is Debbie Fountain. I am the Director of the Housing and Neighborhood Services Department for the City of Carlsbad, which includes administration of redevelopment programs.

Q2. What is the purpose of your testimony?

A2. As described in the Committee's Revised Scheduling Order, the purpose of my testimony is to discuss "issues associated with Conditions LAND-2 and LAND-3 and their environmental impacts."

Q3. What do you believe are the "issues associated with Conditions LAND-2 and LAND-3?"

A3. I believe there are two issues associated with these two conditions:

1. Are they necessary for meeting the local LORS requirement for the CECP to provide an extraordinary public benefit?
2. Are they sufficient, by themselves, to meet the requirement for the CECP to meet the extraordinary public benefit requirement?

Q4. Do you believe these two conditions are necessary to meet the Redevelopment Agency's extraordinary public benefits requirement? Could they be part of a benefits package to meet the extraordinary public benefit test?

A4. Yes, the two conditions are necessary and could be part of a benefits package offered by the applicant for the CECP and/or the land owner for both the EPS and CECP. As I have testified previously, the primary purpose for establishing the South Carlsbad Coastal Redevelopment Project Area (SCCRA) which includes the property upon which the Encina Power Station (EPS) and proposed CECP are located was to eliminate blight and environmental deficiencies or other blighting influences. There are many objectives for the SCCRA, but one very important objective is to convert the industrial land occupied by the EPS to a more appropriate land use that would also provide for public amenities beneficial to the Carlsbad community. Per the SCCRA Plan, new industrial uses, such as power generating and transmission facilities, are only permitted in the SCCRA if they provide **extraordinary** public benefits. (PMPD

Hearing Transcript, May 19, 2011, pages 217 and 218). Please note this requirement is not for ordinary public benefits but for extraordinary public benefits. The scale of a project, not only in terms of its size and height but also its long term potential environmental impacts and potentially negative influence on adjacent land uses determines the Redevelopment Agency's threshold for what constitutes an extraordinary public benefit. For the proposed CECP, the threshold is understandably very high. Land Use 2 and 3 are required to meet this threshold. The modified Land Use 2 and 3 conditions proposed by the applicant do nothing to further the redevelopment goals or address the blighting conditions caused by the new and existing power plants. They simply require more planning for future action. This is a standard protocol for development but makes no binding commitment to move forward with the demolition or removal of the EPS; they provide no benefit to the SCCRA or the City.

In my testimony, I also provided information on the Poseidon Desalination project as an example of a project that met the extraordinary public benefits requirement for comparison purposes. This testimony was instructive as to the level of benefits required for the Redevelopment Agency to make the extraordinary public benefits findings to approve a new industrial use within the SCCRA.

In my written testimony of January 4, 2010 (page Fountain 7), I said that one reason the Redevelopment Agency was not able to support the CECP was because there was:

“No guaranteed time commitment for demolition of the existing power plant. This raises a serious concern that the SCCR Area could potentially have two highly industrial uses operating on key coastal property for many years. This is detrimental to the redevelopment goals for the area.”

Conditions LAND-2 and LAND-3 go a long way to meeting this requirement and are necessary to meeting the Agency's extraordinary public benefits requirement as noted above. As I recommended in my updated report to the Redevelopment Agency following the Commission's September 19, 2011 Business Meeting (included as an attachment to the City's September 23, 2011 Comments), “inclusion of Land-2 and Land-3 is a minimum requirement for project approval...”

Q5. How could LAND-2 and LAND-3 be improved to meet the extraordinary public benefits test?

- A5. As noted on page 19 of the City's comments on the Errata to the Presiding Members Proposed Decision, that while LAND-2 and LAND-3 call for demolition plans, financing plans, redevelopment applications and permit applications, there is no guaranteed date of demolition and remediation. For the condition to be truly effective, a specific date should be identified and only delayed as the result of positive action by the California Independent System Operator or an appropriate government

agency rather than the other way around. As I said on page 7 of my January 4, 2010 written testimony, the lack of a guaranteed time commitment for demolition of the existing power plant "...raises a serious concern that the SCCR Area could potentially have two highly industrial uses operating on key coastal property for many years. This is detrimental to the redevelopment goals for the area." The potential for two power plants within the SCCRA for an unknown period of time exacerbates the conditions of blight which is not acceptable and is inconsistent with the goals and objectives for the SCCRA. The CECP without removal of the EPS within a specified period of time is inconsistent with the SCCRA Plan, which is a clear violation of the redevelopment LORS, because the project does not result in the elimination of blight and does not provide for extraordinary public benefit. These are the most basic requirements for approval of a project within the redevelopment area.

To improve the conditions, the CECP would need to offer a plan that includes the following:

- (a) CECP would not sign new bilateral contracts with SDG&E for energy deliveries after January 1, 2015.
- (b) Each year starting on January 1, 2015 the EPS owner would apply to the California ISO and the CPUC for permission to retire and demolish the EPS. If these agencies do not approve the request, NRG will re-apply every year until the request is approved,
- (c) When no longer under a "must run" contract and immediately following CPUC/ISO permission to retire the EPS, demolition and remediation would commence.
- (d) Finally, NRG/CECP would not oppose other SDG&E projects, such as the three PPA projects before the CPUC.

Another improvement in the conditions could be to clarify the financial obligation of the project relative to the redevelopment effort. We agree that placing the entire financial burden of demolition/remediation on the CECP may not be appropriate or necessary, and we would agree to such an obligation backed by CECP's parent, NRG. For example, I believe the City and Redevelopment Commission would be open to discussing a Letter of Credit or corporate guarantee by the parent company to finance the demolition/remediation of the EPS site

Q6. Was your recommendation you made in the staff update following the September 19, 2011 Business Meeting supported by the Redevelopment Commission?

A6. Yes, the Housing and Redevelopment Commission adopted on September 20, 2011 Resolution 513 (also included as an attachment to the City's September 23, 2011 Comments) which stated:

“...without those conditions (Land-2 and Land-3) the project clearly does not serve any extraordinary public purpose for such a redevelopment project...”

“...without the conditions Land-2 and Land-3 the Housing and Redevelopment Commission would not issue a redevelopment permit for this proposed redevelopment project since it would not eliminate the blighting influence of a second power plant in the project area.”

Q7. Do you believe that LAND-2 and LAND-3, by themselves, are sufficient to meet the extraordinary public benefit LORS?

A7. No, but they need to be part of the benefit package. Again as I stated in my written testimony in January 4, 2010, I was and continue to be concerned that the size, visual appearance, visual impacts, and lack of public access and recreational amenities associated with the proposed project add to the blighted conditions of the site and run counter to the intent of the Redevelopment Plan. That is why I identified on pages 7, 8, and 14 of that testimony a list of concerns and examples of actions that could be taken to provide an extraordinary public benefit. As demonstrated in the attachment to my January 4, 2010 written testimony, I believe the benefits currently attributed to the CECF are ordinary, typical of any power plant or industrial facility and do not rise to the status of extraordinary public benefits.

I would note that the Redevelopment Agency also made this clear on page 7 of its comments on the Errata to the Presiding Members Proposed Decision: “The proposed conditions, (Land 2 and Land 3) are necessary but not sufficient to provide those extraordinary public benefits.” The reason for this conclusion was explained on page 19 of the City’s comments on the Errata to the Presiding Members Proposed Decision – by themselves; these two conditions do not go far enough to meet the Agency’s extraordinary public benefit requirements. However, they definitely could be part of the benefit package offered by the applicant with some date certain improvements on demolition and remediation of the EPS as noted in A5 above.

Q8. Realizing that the Redevelopment Agency has not been provided with any type of list of additional benefits, do you have any examples of other actions the applicant could take or offer to meet the LORS related to the extraordinary public purpose/benefit finding?

A8. To reiterate from my previous testimony, examples of extraordinary public purpose or benefits could include but may not be limited to:

- A binding commitment that the existing power plant (EPS) be decommissioned and all buildings and related facilities be demolished by a

date certain. This commitment has been provided for in Land Use Conditions 2 and 3 as set forth by the CEC. The Agency has suggested modifications to the conditions to set forth a schedule for actions related to demolition. However, as indicated here, this is only part of the extraordinary public purpose or benefit package. There needs to be other substantial public benefit as noted in the following examples to meet the test.

- An Owner Participation Agreement (OPA) with the City of Carlsbad and Carlsbad Redevelopment Agency prior to start of CECP project construction binding NRG on decommissioning and demolition of the existing power plant (EPS), and requires NRG to deposit funds with the City and/or Agency to initiate and complete a comprehensive Conceptual Master Plan and/or Land Use Development Strategy for the subject property and to bond for removal of the existing plant by a date certain.
- Select a developer to redevelop the existing power plant site as soon as the above noted Conceptual Master Plan and/or Land use Development Strategy is complete and approved by the City Council and the Housing and Redevelopment Commission.
- Substantially improve the landscaping and fencing on the perimeter of their property to aesthetically enhance the area as a temporary measure until such times as the property can be redeveloped.
- Provide public parking on their property for visitors and/or residents that wish to enjoy the beach and/or coastal resources in the area.
- Assist SDGE/Sempra to relocate the switchyard off the property of the existing power plant at the time the new power plant is constructed.
- Dedicate at least 32 acres of land on the most northern end of the NRG property (adjacent to the lagoon and north of existing power plant) to the Redevelopment Agency at no cost for public access and public coastal recreational amenities.

The above benefits would be considered satisfactory to the Agency and would allow us to make the extraordinary public purpose finding.

Q9. Has the Redevelopment Agency reviewed a package of benefits to be offered by the applicant as part of the CECP? If so, what was their response?

A9. No, the applicant did not apply for a redevelopment permit from the Agency and also made no offer of extraordinary public benefit for its consideration. The examples noted in A8 demonstrate the type of benefits that would be considered extraordinary by the Agency. There, however, have been no offers from the applicant for the CECP to be considered by the Agency.

Q10. Do you have an opinion on when all five units of the EPS could be retired and demolished, and the land remediated to allow for new development?

A10. My initial opinion from my previous testimony was that the EPS could be demolished by 2013. This was based on initial indications of schedule from the applicant for the CECP. However, I have been recently informed that SDG&E believes that the EPS could be retired in 2017, without the CECP. Therefore, I have accepted the fact that the EPS could not be retired before 2017. Based on the CECP testimony (pages 5-7), a power purchase agreement (PPA) with a “load serving entity” is required for a successful project. Based on my understanding of the status of these agreements and that the three SDG&E executed PPAs are meeting opposition from a part of the CPUC staff as “not needed”, it has become clear to me that the retirement/demolition of the EPS will not occur much sooner than 2017. Therefore, I have accepted this fact and drafted proposed timing conditions for demolition, as indicated in A5, with this date in mind.

Q11. The applicant filed testimony (November 18, 2011) for the CECP which lists a number of CECP project benefits. Do you have an opinion on these benefits?

A11. Yes. The applicant identified ten “benefits that justify override” and nine items that are economic and development benefits. None are compelling, and all represent ordinary benefits of a power generating plant. As noted in my previous testimony, the SCCRA Plan, which is a LORS, requires **extraordinary** public benefit in order to obtain approval by the Redevelopment Agency.

Q12. Would you please comment on the ten items that applicant has indicated justify an override?

A12. Yes. Please refer to the Exhibit 446 and 447: “Housing and Redevelopment Commission Resolution No. 513” and “Update Report on Proceedings Before the CEC on September 19, 2011, Carlsbad Energy Center Project” attached to City of Carlsbad and Carlsbad Redevelopment Agency Comments Following September 13, 2011 Carlsbad Committee Conference”. This approving resolution and Redevelopment Agency staff report were submitted to the Agency and I am its sponsor. A discussion of these benefits starts at page 4 of this document. Only two benefits advanced by Mr. Rouse are not covered in this staff report. Following is a summary of the supposed benefits indicated by the applicant, with some combined, with my response;

| CECP | Agency Staff Response |
|--------------------------------|--|
| Achievement of goals of SCCRA. | While it is true that the CECP will be a smaller, more efficient plant located east of the railroad track, the project itself does not eliminate blight or any |

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|--|--|
| | <p>blighting conditions with its construction. It is both visually and physically a highly industrial use, which creates new blighting conditions and does nothing to eliminate the blight or blighting conditions caused by the existing power plant, or the EPS. This is a basic principle of redevelopment – elimination of blight – and all projects must address it. The SCCRA Plan also anticipated development of the property on the west side of the railroad tracks. The CECP has made no binding commitment to demolish the EPS and prepare the site for development to a higher and better use from a public benefit standpoint.</p> |
| <p>Retirement & decommissioning of existing units 1-3.</p> | <p>There will be some benefit from the retirement of these three units. However, this benefit will most likely occur with or without the CECP by 2017 due to restrictions placed on certain coastal power plants by the State Water Resources Control Board. With no commitment to demolish the massive building that houses the units, there is no significant benefit from this action, and the blight from the building will remain.</p> |
| <p>Consistency with the City’s goal to phase-out existing power plant for community and commercial redevelopment, and provision of new energy supplies that are critically needed in San Diego by 2012..</p> | <p>It has become clear that SDG&E may not need this electric capacity in order to retire the EPS. SDG&E filed a request with the PUC on 5/19/11 requesting approval of 3 new power purchase agreements representing 400 MW of new capacity. In addition, there has been no commitment to retire the EPS units. Actually, the indication has been that Units 4 & 5 will continue to operate for as long as they are profitable. No commitment to date to demolish existing plant.</p> |
| <p>Use of highly efficient natural gas fueled generating units burn 30% less fuel, resulting in 30% better GHG</p> | <p>The applicant offers no proof that there will be increased reliability, or any assurances that Carlsbad residents will</p> |

| | |
|---|--|
| performance. | benefit directly from the CECP. While there will be a reduction in pollution from the retirement of EPS 1-3, the new plant could be operated more hours per year and, therefore, there may be no significant benefit. |
| Installation of two low profile, high-efficient new units totaling 558 MW, and consistency with State policies on power generation. | These benefits are not localized; they are regional benefits which are typical of any new power plant. They do not represent extraordinary public benefits to the Carlsbad community, and do not address the elimination of blight or a blighting condition to address the redevelopment need. |
| Provision of new revenues to the City of Carlsbad of \$5 million per year. | The CECP does represent a sizeable investment and will generate additional tax revenues. However, Agency staff has learned over the past 10 years that power plants depreciate in value fairly quickly. Therefore, more desirable commercial developments on the subject property would provide more public benefits from a use standpoint, but also provide for a more stable revenue source in the future. |
| Replacement of 225 million gallons per day of ocean water for cooling with air cooling to protect marine life. CECP will decommission and demolish | The CECP does represent an improvement or enhancement of marine protection. However, this is a required action and does not represent any additional benefit offered by the CECP. |

Q13. Do you concur with the CEC staff's evaluation of the potential environmental impacts of implementing Conditions LAND-2 and LAND-3?

A13. I have read the CEC staff's assessment of the potential environmental impacts associated with the demolition removal, and remediation of the Encina Power Station beginning on page 14 of their Supplemental Testimony. I agree with their overall analysis and conclusions. My expectation is that removal of the Encina Power Station will be a significant benefit to the community, adjacent state park and land owners, travelers on Interstate-5 and the rail line. It will also be a major step in reducing the blighted conditions within the South Carlsbad Coastal Redevelopment area. The magnitude of this step, however, will be partially eliminated by the construction of the CECP which will continue a heavy industrial presence in the

Redevelopment Area for another 30 years or more. A greater travesty, however, would be for the CEC's decision to result in the existence of two power plant buildings within the Redevelopment Area by not requiring the timely removal of the EPS.

Q14. The Committee has previously suggested that there may be a role for the Redevelopment Agency in the removal of the Encina Power Station. Can you explain how the redevelopment process works?

A14. Redevelopment agencies typically have negotiated development or owner participation agreements with private developers/property owners to set forth each party's role and responsibilities if there is going to be any type of partnership in development. In order for there to be an incentive for the redevelopment agency to take a financial role in the redevelopment of a site or use its other resources to assist, there needs to be assurances that the redevelopment effort will produce substantial tax increment funds and that the activity will result in the elimination of blight or blighting influences.

Tax increment is received by the Redevelopment Agency when there is new development that increases the value of a property over its base value when the redevelopment plan was adopted (2000). Due to reassessments of the existing power plant (EPS) by the State over time which substantially lowered the value of the plant, the Redevelopment Agency currently receives no tax increment for the SCCRA. Therefore, it has no funds that it can loan or bond against to provide any financial assistance to any new development project. It is possible that the City could advance funds to the Redevelopment Agency for an activity, and that the Agency could repay this debt over time. However, there needs to be assurances that the tax increment to be generated by the Agency investment will be substantial enough to allow for repayment of any advances or loans from the City in a reasonable period of time. At this time, the Agency has no assurances that the EPS will be demolished and the site remediated in a timely manner to allow for private development that benefits the SCCRA and the larger community, and that blight or blighting influences will be eliminated as a result of the redevelopment effort. In addition, the Agency has discovered over the past 10 years that power plants lose their value fairly quickly even during a strong economy. Therefore, investment which results in the production of a power plant rather than commercial or other type of visitor-serving uses is not a prudent business decision for the Agency.

Q15. The Applicant has raised concerns regarding the financing of the demolition and remediation for the Encina Power Station. What can the potential role of the Redevelopment Agency be in assisting with financing?

A15. As I discussed in my written testimony of January 4, 2010 and in my testimony above, the primary financing source to implement blight removal programs is tax increment revenue. Tax increment is the difference between the value of the property when the redevelopment area was adopted and the new value after redevelopment of a property. For example, if the current value of a property is \$10,000,000 and after redevelopment it is \$30,000,000, there is tax increment of \$20,000,000. The Redevelopment Agency and other taxing agencies would receive 1% of this tax increment, or \$200,000. For redevelopment purposes, the Agency receives approximately 80% of this revenue (\$160,000) for redevelopment activities; 20% of the funds (\$32,000) must be used to provide for affordable housing. The remainder of these funds (\$128,000) can be used for non-housing projects. These funds have been successfully used throughout the State in previous years by Redevelopment Agencies to facilitate redevelopment of blighted areas, create new jobs, provide public infrastructure and other community amenities, and to prevent the further decline of neighborhoods. Unfortunately, the State of California has recently approved legislation which would eliminate redevelopment programs or allow programs to remain but substantially reduce their funding. The legislation was legally challenged and a court decision is currently pending. At this time, we would not be able to enter into any new agreement to finance redevelopment activities of any kind with tax increment.

If the owner of the Encina Power Station (EPS) had already entered into a development or owner participation agreement with the Redevelopment Agency and both parties had agreed to their respective roles in redevelopment of the EPS site with the appropriate assurances provided for future redevelopment activity, it is possible that the Agency could have used its resources (financial or other) to play a role in the elimination of the EPS and ultimately to redevelop the site. Several past attempts have been made by City and Agency staff to negotiate this type of agreement with the current property owner(s) with no success to date. Because the Housing and Redevelopment Commission on behalf of the Redevelopment Agency indicated that it does not support the current CECP and there is no timeline or binding commitment from the applicant for redevelopment of the EPS site, there is no incentive for the Agency to continue negotiations for any type of partnership for redevelopment. If the applicant were to demonstrate a good faith effort to meet the requirements of the redevelopment plan and provide for the extraordinary public purpose, the Agency would have more incentive to continue negotiations to financially participate in the redevelopment of the CECP or EPS properties.

The applicant has stated on several occasions that they intend to redevelop the site of the EPS. However, over the past 11 years, the applicant has never been willing to enter into a binding commitment to this redevelopment effort. It is disingenuous at this time for the applicant to indicate that the conditions requiring the demolition and remediation of the site are now not financially feasible.

Q16. The PMPD states that the massive turbine generator building and 400 foot stack could lie idle after the plants useful life. Do you agree?

A16 Yes, with the exception that there is a condition of project approval by the City Council requiring the demolition of the stack when it is no longer needed for air dispersion as determined by the Council. This, however, remains a concern for the Redevelopment Agency. Whether the plant continues to operate or remains idle, it represents a blight or blighting influence within the area and is a deterrent to a more appropriate land use and development that will provide greater public benefit to the community. We understand that NRG cannot be forced to demolish or remediate this power plant. We do, however, believe that the real estate asset is quite valuable for a use other than power generating facility, and it will ultimately be developed to its highest and best use. NRG will likely redevelop this land when feasible to realize income for its shareholders. We, however, continue to believe that they need to commit to this action if they are going to build another power generating facility on the property that will remain a blighting influence for the next 30 to 50 years.

Q17. Do you have any concluding observations?

A17. Yes. I believe that adding a new power plant in the redevelopment zone, on the coast, flies in the face of all that the citizens of Carlsbad have been trying to achieve for many years. It also does not meet the most basic LORS of the redevelopment plan for the area; it does not eliminate a blight or blighting influence within the area and the CECP as a stand-alone project provides no extraordinary public purpose. The CECP should not be approved if it can't meet these basic LORS for projects of its type in the redevelopment area. I do not believe that the new plant can demonstrate an "extraordinary public purpose", or demonstrate that it is removing blight or a blighting influence. The extraordinary public purpose/benefit findings were incorporated into the SCCRA Plan in 2005 in order for the Agency to take all reasonable actions necessary to ensure the continued fulfillment of the redevelopment purposes of the Plan and to prevent the recurrence or spread of conditions of blight in the SCCRA. The proposed CECP without Land Use 2 and Land Use 3 conditions only serves to intensify the industrial use of the subject property and provides only ordinary benefits of a power generating plant. The CECP will create additional conditions of both physical and economic blight which is contrary to the purpose of redevelopment and the goals and objectives set forth within the SCCRA Plan. Although I have testified that Land Use 2 and 3 do not go far enough to satisfy the extraordinary public benefit requirements of the SCCRA Plan, without those conditions there is no non-ordinary benefit at all. At a minimum, those conditions must be required. It is also my contention that additional timing concerns should be addressed for these land use conditions to provide appropriate benefit.

Q.18 Are you sponsoring any exhibits?

A.18 Yes. I am sponsoring two exhibits (1) Housing and Redevelopment Commission Resolution 513, dated September 11, 2011; (2) Staff Report "Update Report on Proceedings before the CEC on September 19, 2011, Carlsbad Energy Center. They are Exhibits No. 446 and 447, respectively.

CECP SUPPLEMENTAL EVIDENTIARY HEARING

LAND -2 and LAND -3

DIRECT TESTIMONY OF RONALD R. BALL, CITY ATTORNEY OF THE CITY OF CARLSBAD AND GENERAL COUNSEL OF THE REDEVELOPMENT AGENCY OF THE CITY OF CARLSBAD REGARDING OFFICIAL NOTICE AND CONSEQUENCES OF THE RECENT CITY AMENDMENTS TO ITS GENERAL PLAN AND ZONING ORDINANCE

Q1. Please state your name and position.

A1. I am the City Attorney of the City of Carlsbad and General Counsel for the Redevelopment Agency of the City of Carlsbad.

Q2. Please state your qualifications and background as relevant to these proceedings.

A2. I graduated from Stanford University in 1966 with a Bachelor of Science Degree in Civil Engineering and was an engineer for Caltrans in its San Francisco office and an engineer for the Boeing Company.

I graduated from the University of California, Berkley in 1969 with a Masters Degree in Business Administration with an emphasis on finance and economics. I was a mortgage banker for a construction and development real estate and investment trust for large commercial projects throughout the Southeastern United States.

I graduated from University of Santa Clara School of Law in 1976 with a Juris Doctorate Degree and was admitted to the California State Bar thereafter. I have continuously practiced law since that time. I was in private practice in the San Francisco bay area from 1977 through 1980 and then an attorney for the County of Mendocino from 1980-1986 specializing in land use. From 1986 through 1991, I was Assistant City Attorney for the City of Carlsbad and appointed to the position of City Attorney for the City of Carlsbad and General Counsel for the Redevelopment Agency of the City of Carlsbad in 1991. I have continued in those capacities until the present time. I have prepared or approved all legal documents for the City of Carlsbad and the Carlsbad Redevelopment Agency since that time including Resolution No. 2011-229, Urgency Ordinance No. CS-067, Housing and Redevelopment Commission Resolution No. 514, City Council Ordinance No.'s CS-158, CS-159, and CS-160 and Resolution No. 2011-230 which are relevant to these proceedings and the Committee's Order of November 9, 2011.

Q3. Explain how these ordinances and resolutions amending the land use regulations apply in this proceeding.

- A3. These ordinances and resolutions were adopted following a two year moratorium on the location of power plants in the City of Carlsbad Coastal Zone. Ordinance No. CS-158 amends the Zoning Ordinance as it pertains to generation and transmission of electricity in the Public Utility Zone. It authorizes generation of electricity as a primary use outside of the City's coastal zone only. It provides for the generation of electricity in the Coastal Zone of fewer than 50 megawatts, as an accessory use only by governmental entity or a private company that is selling electrical energy to a governmental entity or a company that has received a CPCN from the CPUC. It is the final action taken by the City Council of the City of the Carlsbad and will not become effective until approved by the California Coastal Commission.

Ordinance No. CS-159 amends the Precise Development Plan to make it clear that the Encina Power Station is not consistent with the General Plan or the Zoning Ordinance due to its location in the Coastal Zone and its generating capacity. The Precise Development Plan encompasses the 95-acre Encina Power Station, which includes the proposed CECP. It became effective on November 11, 2011.

Ordinance No. CS-160 amends the Encina Specific Plan which encompasses approximately 680-acres and requires all uses within it to be consistent with the General Plan and the Zoning Ordinance. It was first adopted by the City Council in 1971 and has been amended and restated through the years with this being the latest amendment. Among other things, it makes clear that power plants, including the proposed power plant, are inconsistent with the General Plan, the Zoning Ordinance and this Specific Plan. It does not contemplate any future power plants and the heights of all buildings shall not exceed 35 ft. It continues the requirement that when the existing 400 ft. stack is no longer necessary, it shall be removed at the applicant's expense (Ordinance No. 9456, adopted May 4, 1976). It became effective on November 11, 2011.

Resolution No. 2011-230 approved a General Plan Amendment and a Local Coastal Program Amendment. The General Plan Amendment became effective on October 27, 2011 and the LCPA will become effective when approved by the California Coastal Commission.

Q4. The Applicant quarrels with the effectiveness of these resolutions and ordinances. Do you have an opinion on that?

- A4. Yes. The resolutions and ordinances became effective on the dates I specified above. If the Applicant disagreed with those ordinances and resolutions, its remedy is to challenge them in the superior court. It has not done so and they are presumed to be lawful and operative by their terms. Applicant may not collaterally attack them in these proceedings. Therefore, these resolutions and ordinances are entitled to the dignity and respect of any other law and regulation in the State of California except that they operate within the corporate boundaries of the City of Carlsbad.

Although the Applicant must comply with these ordinances and regulations, the Energy Commission can overrule them if it chooses to exercise its paramount jurisdiction.

Q5. In your opinion does the proposed plant comply with the City's land use laws?

A5. No, it violates the terms and conditions of Ordinance No.'s CS-158, CS-159 and CS-160 and Resolution No. 2011-230. It also violates the terms, conditions and prohibitions of the South Hedionda Local Coastal Plan and the Redevelopment Plan as set forth in previous testimony.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

12/1/2011

Date

/s/ Ronald R. Ball

RONALD R. BALL

CECP SUPPLEMENTAL EVIDENTIARY HEARING

OVERRIDE

**PREPARED DIRECT TESTIMONY OF BOB THERKELSEN
CITY OF CARLSBAD**

Q1. Please state your name and position.

A1. My name is Bob Therkelsen. I am a consultant on energy and environmental permitting and policy. I am an advisor to the City of Carlsbad and Carlsbad Redevelopment Agency in this proceeding.

Q2. What is your experience with the Energy Commission siting process?

A2. I worked for the Energy Commission between 1975 and 2005. For 15 of those years I served as Deputy Director of what was then called the Energy Facility Siting and Environmental Protection Division, the division responsible for managing the Commission's power plant siting and compliance monitoring programs. Previously I had worked as an Office Manager, supervisor, and technical staff in the Division. For the last several years of my employment at the Commission, I served as the Executive Director.

Q3. What is the purpose of your testimony?

A3. The Committee's Revised Scheduling Order of November 29, 2011, identified one of the topics as "Additional evidence, not previously presented, regarding whether it is appropriate to override either unmitigated environmental impacts or noncompliance with state or local LORS." The purpose of my testimony is to provide context for the Committee's consideration and discuss the appropriateness of an override in this case.

Q4. What exhibits are you sponsoring?

A4. I am sponsoring exhibits 450, 451, 452, 453, 454, and 455.

Q5. Will you briefly summarize the applicable override provisions?

A5. There are two types of "overrides" which may come into play in a power plant siting case. The first arises under CEQA and the second under the Warren-Alquist Act.

Under CEQA, a finding of overriding considerations is required whenever the lead agency proposes to approve a project that will have significant, adverse environmental impacts that cannot be reduced or avoided by feasible mitigation measures or alternatives. The lead agency cannot approve the project unless they find: (1) there are no feasible alternatives which could avoid or substantially lessen the unmitigated significant impacts, and (2) such impacts are acceptable due to overriding concerns. (Pub. Res. Code § 21002; 14 Cal. Code Reg., § 15092(b)(2).) In arriving at these overriding considerations, the agency must balance, as applicable, “the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project.” (14 Cal. Code Reg., § 15093(a).) If, in the agency’s judgment, the benefits of the proposed project outweigh the adverse environmental impacts, the impacts may be considered “acceptable” and the project may be approved.

The second arises under the Warren-Alquist Act and is required if the Commission wishes to approve a proposed project that does not conform to state or local laws, ordinances, regulations, or standards (LORS). Under the Act, where a proposed project does not conform to state or local LORS, the Commission cannot license that project unless it determines that (1) the project is required for “public convenience and necessity,” and (2) there are not “more prudent and feasible means of achieving such public convenience and necessity”. (Pub. Res. Code § 25525; 20 Cal. Code Reg., § 1752(k).) This determination must be based on the totality of the evidence of record and must consider environmental impacts, consumer benefits and electrical system reliability. In essence, a project’s lack of conformity with LORS must be balanced against its anticipated benefits.

All of the Commission’s override findings must be supported by substantial evidence in the record. (14 Cal. Code Reg. §§ 15091(b), 15093(b).)

My testimony primarily focuses on LORS overrides.

Q6. How frequently have overrides been used in Energy Commission proceedings?

A6. The use of either CEQA or LORS overrides has been very infrequent in CEC proceedings. CEQA overrides are more common. Out of the approximately 70 Applications for Certification the Energy Commission reviewed and reached a final decision on since 1996, only four natural gas projects were approved with a LORS override. Those projects were Metcalf (99-AFC-3), Los Esteros 2 (03-AFC-2), El Segundo (00-AFC-14), and Morro Bay (00-AFC-12). LORS overrides were also extensively discussed in Eastshore (06-AFC-6) and were subsequently denied.

While I do not have numbers prior to 1996, my recollection is that CEQA overrides were also infrequent and LORS overrides were rare.

One of the primary reasons for that infrequent use of either CEQA or LORS overrides is that the Commission staff and Committees work diligently to avoid or correct significant adverse environmental impacts or LORS non-conformance. As noted in the Los Esteros II motion by staff for an override:

“Commission overrides of inconsistency with local government ordinances are uncommon, in part because the Commission solicits local government participation in the siting process (Pub. Resources Code, §§ 25519(f), 25538), but also because the Commission is required to ‘consult and meet’ with local government officials in an effort to avoid the necessity for an override. (Pub. Resources Code, § 25523(d)(1).)” (Staff Motion, May 26, 2006, page 8)

Q7. What is your view of a LORS override by the Energy Commission in a siting case?

A7. Let me start by saying that there are typically two circumstances for a LORS override. The first I refer to as a “friendly” override and exists where a state or local agency cannot or prefers not to eliminate a LORS non-conformance for administrative or timing reasons and does not object to the Commission exercising its override authority. This has happened when a county, for example, did not want to process a General Plan Amendment for administrative reasons and requested the Commission to override the provisions. The second I refer to as a “hostile” override where there is a state or local conformity issue, discussions between the Energy Commission and agency were not able to resolve the non-conformance, and the state or local agency believed that approval of the project was inappropriate because of the non-conformance.

In my opinion, the use of a “hostile” LORS override is a serious action; it should not be taken lightly. LORS are established by state or local agencies for specific purposes – to protect critical resources, protect the public health and safety, direct actions to achieve specific policies or objectives. I believe the Commission should respect those determinations. Having said that, our electricity system is of critical importance to the broader state and region. There clearly have been and will be instances where the Commission needs to exercise its override authority in the broader public interest. In instances where there is a demonstrated critical local, regional, or statewide electricity system need that cannot be met by other means in a reasonable timeframe consistent with the need, I believe an override is appropriate.

This opinion has also been reflected in previous Commission decisions. The first instance of a LORS override since 1996 was in the Metcalf Energy Center project (99-AFC-3). Metcalf was an extremely controversial case that was not able to

comply with all applicable local LORS. The assigned Committee engaged in a thorough and thoughtful analysis of the issues in that case and the necessity of a LORS override. The Final Decision, adopted by the full Commission, noted the significance of a LORS override. They stated on page 469:

“Exercise of our override authority is an extraordinary measure which, in our opinion, must be done in as limited a manner as possible.”

In denying an override on the Eastshore project, the Commission also emphasized the limited use of an override. They said:

“... the Commission has consistently regarded a LORS override ‘an extraordinary measure which . . . must be done in as limited a manner as possible.’” (Final Decision, Eastshore Energy Center, October 8, 2008, page 453)

Q8. What criteria or basis has the Energy Commission used in the past when making a LORS override determination?

- A8. To exercise its LORS override authority, the Commission must find that the project is required for public convenience and necessity and there are not more prudent and feasible means of achieving such public convenience and necessity.

More Prudent and Feasible Means - The finding that there are not more prudent and feasible means of achieving the public convenience and necessity has typically focused on an analysis of alternative technologies and alternative sites within the region. In its previous determinations, the Commission has emphasized the importance of the word “more” in looking for prudent and feasible options. As noted on page 595 of the Morro Bay Final Decision:

“Under the Warren-Alquist Act, the existence of a ‘prudent and feasible’ means of achieving the public convenience and necessity does not prevent an override; only the existence of a ‘more prudent and feasible’ means prevents the Commission from overriding LORS.”

Factors that the staff and Commission have historically considered in this analysis of override alternatives have included significant adverse impacts, expected conformance with LORS, and timing.

Public Convenience and Necessity - The Commission has traditionally looked to the California Public Utilities Code when considering a finding of public convenience and necessity, since those terms are not defined in the Warren-Alquist Act. The Metcalf Final Decision, on page 464, noted that the phrase “public convenience and necessity”:

“... is well-settled by judicial decisions on Section 1001 that ‘public convenience and necessity’ has a broad and flexible meaning, and that the phrase ‘cannot be defined so as to fit all cases.’ ” (*San Diego & Coronado Ferry Co. v. Railroad Commission (1930)* 210 Cal. 504.) In this context, ‘necessity’ is not used in the sense of something that is indispensably requisite. Rather, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. It is a relative rather than absolute term whose meaning must be ascertained by reference to the context and the purposes of the statute in which it is found.”

I strongly agree that there is a fair amount of discretion in making an override finding and a requirement to balance often competing policies and interests. I applied these considerations in directing the CEC staff and making recommendations to the Commission. I also believed that an override finding requires a significant local, regional, and/or statewide justification.

Evaluation Considerations - Based on my experience at the Commission and review of Commission decisions, there is no single criteria for making a LORS override decision. Each case considering a LORS override at the Commission has looked at the previous cases presumably in an effort to maintain some consistent threshold of significance. But in denying the Eastshore override, the Commission made it clear each project and its evaluation criteria are unique:

“... (W)e realize that our PMPD discussion may have inadvertently suggested that we have essentially established precedential and non-regulatory standards specifying elements necessary to justify an override or constitute a showing of ‘public convenience and necessity.’ This is not the case. Consistent with our fact-finding role, the *Metcalf*, *Los Esteros*, and *El Segundo* rationales were driven by the specific facts, issues, and evidence unique to each project. Such is also true here.” (Eastshore Energy Center, Final Decision, October 8, 2008, page 454)

Range of Factors Considered - The public convenience and necessity considerations the five cases where the Commission considered a LORS override and their page references (from the Final Decision or the Presiding Members Proposed Decision if the PMPD was only adopted) were:

| CONSIDERATION | METCALF | LOS ESTEROS 2 | MORRO BAY | EL SEGUNDO | EAST SHORE |
|--|-------------|---------------|-----------|------------|------------|
| Project is reasonable related to the Warren-Alquist goals and policies | X - 464 | X - 397 | X - 593 | X - 296 | 1/ |
| Electricity is needed within the local area | X - 99, 464 | X - 367 | X - 597 | X - 296 | X - 453 |

| | | | | | |
|---|-------------|---------|--------------|---------|---------|
| The local area faces serious electricity shortages | X - 99 | | | | |
| The region is generation deficient | X - 99 | | | | |
| The Integrated Energy Policy Report (IEPR) identified the statewide need for substantial generation additions | | X - 368 | X - 594 | X - 297 | |
| The IEPR identified the regional need for increased electricity supplies | | | | X - 297 | |
| Profound electricity reliability benefits | X - 85, 467 | | | | |
| Significant transmission system benefits | X - 99 | X - 370 | | | X - 453 |
| Improvements in electricity system operation | X - 100 | | X - 594 | X - 297 | |
| Reduce the cost of electricity to consumers | X - 467 | X - 371 | | | X - 453 |
| Make substantial use of existing infrastructure | | | X - 594 | X - 297 | |
| Reduce the impact of the existing power plant on the community through required removal of existing equipment, reduced stack height, etc. | | | X - 594 | X - 173 | |
| Replace aging generation | X - 99 | | X - 597 | X - 297 | X - 453 |
| Environmental benefits | | | X - 556, 562 | X - 297 | |

Notes: 1/ This factor was not discussed in Eastshore. I am not sure why.

In each of these cases, the initial and most compelling consideration in the Commission’s use of the LORS override was a critical and clearly articulated need for additional local, regional, or statewide electricity generation as established in the IEPR, Executive Orders, or other major policy document. Although the Commission no longer has a “needs test” for approving energy facilities, it does when it comes to approving a LORS override. This is appropriate because an evaluation of electricity system needs is consistent with the Commission’s expertise. It is also appropriate given the Commission’s responsibility to ensure “... a reliable supply of electrical energy is maintained at a level consistent with the need for such energy for protection of public health and safety, for promotion of the general welfare, and for environmental quality protection” is one of the Commissions expressed mandates. (Public Resources Code Section 25001)

An override on the Eastshore project was rejected because it did not display any critical electricity system benefits:

“In the context of certain statutory factors that section 25525 requires us to examine – consumer benefits and electric system reliability – we find the benefits of EEC are modest at best.” (Final Decision, Eastshore Energy Center, October 8, 2008, page 453)

“There are no other major benefits of the project that would serve the public convenience and necessity. There is also no credible suggestion in the record that the level of benefits associated with the EEC is greater than could normally be expected with another project of a similar nature, nor does the record establish that the EEC will provide benefits to the system which are unique or of a highly compelling nature.” (Final Decision, Eastshore Energy Center, October 8, 2008, page 454)

Other considerations must be considered and have also been important in supporting the Commission’s decision to approve an override. These include environmental protection and consumer benefits. These factors have, however, generally been a secondary consideration. The driving factor behind a LORS override has been the project’s significant benefits to the electricity system.

Geography and Timing - Previous override considerations have also factored in geographical area and timing. In Metcalf and El Segundo for example, the Commission quickly determined that the electricity generated by the facility would be consumed in the local area. They went on, however to say:

“The statute does not, however, focus on public convenience and necessity solely in a limited geographical context. Rather, the focus is on electricity’s essential nature to the welfare of the state as a whole.” (Metcalf Final Decision, date, page 465, also El Segundo Final Decision, February 5, 2005, page 297)

Timing was important in Metcalf, Morro Bay, and, to a lesser extent, El Segundo because of the precarious condition of the state’s electricity system. In evaluating an override for Metcalf, the Commission observed:

“Moreover, the evidence shows that the area’s supply-demand imbalance and the need to augment electrical system reliability in the south Bay and the greater Bay Area require prompt action. The evidence establishes that the MEC is a substantial positive step in this regard, and is in fact the only identified major generation project capable of becoming reality within the near-term future.” (Metcalf Final Decision, September 24, 2001, page 468)

Earlier the Metcalf decision noted:

“We have, however, only the Metcalf project before us, and it is only that project which currently appears reasonably likely of being online in the near-term future. Furthermore, the simple fact is that the MEC is the sole generation project which possesses the potential to provide these benefits in a reasonably ascertainable time period.” (Metcalf Final Decision, September 24, 2001, page 457 and 458)

Policy Balance – In addition to considering and balancing a number of factors, the Commission’s decision on an override finding also requires a careful balancing determination between the objective of the non-conforming LORS and the benefits of the project in question. Again, as stated in the Eastshore decision:

“Therefore, the purposes of any LORS, which we may be asked to override, must be weighed or balanced against the stated goals and policies of the Warren-Alquist Act and the consequences of the override assessed. In other words, we must make a judgment, based upon the unique fact situation before us, which of the competing public purposes is paramount. Is it more important and/or beneficial to the public to positively affect the supply of electricity or is the public interest best served by declining to override and thus avoid hindering the purposes of the LORS in question?” (Final Decision, Eastshore Energy Center, October 8, 2008, page 455)

Q9. During your experience at the Energy Commission, did you have occasion to direct the staff in the use of an override?

A9. While I was the Executive Director, Deputy Director, and Siting Office Manager, there were numerous occasions when I worked with the project manager, technical staff, and staff attorneys to formulate a recommendation on CEQA and LORS overrides. There were times when the staff was split on which position to take and, as the Executive or Deputy Director, I was responsible for making the final determination on whether or not to recommend an override.

One of the more challenging recommendations was on the Metcalf case. As I mentioned earlier, there was significant opposition to the project by the City, citizens groups, and many of the residents. After lengthy discussion with the City in which I personally participated, we were not able to resolve the LORS conformity issues. These issues and significant adverse environmental impacts required the Commission to make override findings if they were to approve the project. Because of internal differences of opinion on whether the staff should recommend an override, I made the final decision and made my recommendation at the Committee hearing on override. The primary reason for my recommendation was because of the critical and well documented regional and statewide energy system needs that

existed at that time. While recognizing the nature of the LORS compliance issue and the environmental concerns associated with the project, my conclusion was:

“... in the opinion of the Staff, those concerns do not outweigh the statewide, regional benefits associated with the project, in terms of increasing supply, increasing reliability of the system, lowering system costs, and stabilizing the whole system, the statewide electricity problem.” (Metcalf Hearing Transcript, March 23, 2001, page 33, line 5)

I also participated in the Commission staff's override discussions on Morro Bay, El Segundo and other project previous to 1996. The staff did not make a recommendation to the Committees on Morro Bay or El Segundo because we had concerns with unresolved environmental impacts and Coastal Act LORS issues.

Q10. Do you have any conclusions on the use of an override with respect to the CECP?

A10. The Energy Commission staff recently stated that the CECP is not in conformance with local LORS. The City has contended that the project is not in conformance with the:

- City of Carlsbad General Plan and other land use requirements (City of Carlsbad, Prepared Direct Testimony of Scott Donnell, January 4, 2010, page Donnell-9-15),
- South Carlsbad Coastal Redevelopment Plan (Testimony by Mr. Kane - RT, Feb. 1, 2010, pp. 94-96 and testimony by Ms. Fountain - Direct Testimony, 1/4/2010, Fountain-9-12; RT, Feb. 1, 2010, p. 110),
- Fire access determinations of the Carlsbad Fire Department and the State Fire Code (Written Testimony of Kevin Crawford, May 19, 2011, page 7)
- California Coastal Act (City of Carlsbad, Prepared Direct Testimony of Mr. Faust, January 4, 2010, page Faust-9)

If the Commission agrees that any of these LORS are in non-conformance, it can only approve the project by making the required override findings. When asked my opinion regarding whether the proposed CECP meets the requirements of a LORS override, I looked at the factors considered in previous override determinations, the geography of the benefits, timing, and policy tradeoffs. While these are not an absolute list, they do provide some guidance. My assessment is as follows:

1. *Is the project reasonable related to the Warren-Alquist goals and policies?*
Yes – As the Metcalf Final Decision noted on page 464:

“The Warren-Alquist Act expressly recognizes that electric energy is essential to the health, safety, and welfare of the people of California, and to the state's economy. Moreover, the statute declares that it is

the responsibility of state government to ensure that the state is provided with an adequate and reliable supply of electrical energy. (Pub. Resources Code, § 25001.)”

Virtually any power plant will meet the general goals and policies of the Warren-Alquist Act. It will provide electricity and help ensure an adequate and reliable supply.

2. *Is electricity needed within the local area?* Yes – In its 2006 long-term procurement planning decision, the CPUC recognized the need for future electrical generation in the San Diego service area and authorized SDG&E to procure 530 MW of new generation (CPUC, Opinion Adopting Pacific Gas and Electric Company’s, Southern California Edison’s and San Diego Gas & Electric Company’s Long-Term Procurement Plans, December 20, 2007, page 301). SDG&E’s electricity demand and supply analysis, included in its testimony before the CPUC, states that its service area potentially faces “...a local capacity shortage of 213 MW in 2018, increasing to 319 MW in 2020,” assuming the addition of additional demand side combined heat and power, uncommitted energy efficiency, and demand response (Exhibit 454, page RA-3). As shown on the accounting table on page RA-4, this amount reflected 320 MW of OTC retirement beginning in 2014 and 960 MW of OTC retirement beginning in 2018. SDG&E proposes to meet its projected shortfall by purchasing power from the three projects selected in its 2009 procurement process. The total generating capacity of these projects is 450 MW.

SDG&E’s assessment of its need for additional generation is disputed by the CPUC’s Division of Ratepayer Advocates. They have filed a protest giving SDG&E authority to enter into the power purchase agreements and testimony stating they oppose “...authorization of any new resources in the SDG&E service area” (Exhibit 451, page 1)

Both SDG&E and DRA have filed and the assigned Administrative Law Judge has approved a motion delaying hearings on the three power purchase agreements following a decision by the CPUC on the 2010 Long-Term Procurement Plans. This will allow the need for the three projects to be based on the most current assessment and decision by the CPUC.

In addition to regional electricity needs, the CAISO had identified a 20 MW requirement for additional generation in the “Encina sub-area” (CAISO, 2013-2015 Local Capacity Technical Analysis, Report and Study Results, December 30, 2010). In a data response submitted through the CPUC’s proceeding on the three PPA, SDG&E stated:

“According to the CAISO’s December 30, 2010 report, the outage of the Encina 230/138 kV transformer, followed by the loss of the 138 kV Sycamore Canyon-Santee #1 line, results in the thermal overload of the 138 kV Sycamore Canyon-Chicarita line. This is an N-1-1 outage which is categorized as a Category C outage under CAISO and NERC reliability criteria. Acceptable mitigation for this Category C outage includes controlled load drop, generation that feeds into the Encina 138 kV bus and reconductoring the 138 kV Sycamore Canyon-Chicarita #1 line. SDG&E has estimated that the reconductoring the 138 kV Sycamore Canyon-Chicarita #1 line is expected to cost about \$1 million. SDG&E’s resource planning analyses, including its analyses submitted to the CPUC in A.11-05-23, take into account resources needed for the entire San Diego area.” (Exhibit 455, page 5)

3. *Does the local area face serious electricity shortages?* No – The discussion on the need for local electricity needs above indicates that additional local generation is not needed until 2018.

In terms of timing, SDG&E expects the power from the three power purchase agreements to be available in 2012 (Escondido Energy Center) and 2014 (Pio Pico Energy Center and Quail Brush (Exhibit 453, pages 2 and 3). This is possible if the CPUC make its 2010 LTPP decision in December 2011, CPUC to make a decision on the three power purchase agreements by June 2012, the CEC to make decisions on the Pio Pico and Quail Brush projects by the end of 2012, and a typical two years for construction.

4. *Is the region generation deficient?* No – The discussion on the need for local electricity needs above demonstrates that the area is not generation deficient and additional local generation is not needed until 2018 at the earliest.
5. *Has the Integrated Energy Policy Report (IEPR) identified the statewide need for substantial generation additions?* No – There is not a critical regional or statewide need for additional generation described in the latest Energy Commission Integrated Energy Policy Report. The 2011 IEPR is expected to be adopted by the Commission in December 2011 and is expected to focus on renewables and attaining the state’s Renewables Portfolio Standard. The 2009 IEPR is the most recent adopted policy report and, unlike previous IEPRs, it did not discuss the need for additional generation but rather discussed challenges associated with changes in the electricity system such as the need for energy efficiency, to reduce GHG emissions, to add more renewable generation, to integrate renewables into the grid, and to eliminate once-through power plants.

6. *Has the IEPR identified the regional need for increased electricity supplies?* No – The 2009 IEPR recognized that demand has dropped by over three percent both statewide and in the San Diego areas and noted that:

“The current forecast is markedly lower than the forecast in the 2007 Integrated Energy Policy Report, primarily because of lower expected economic growth in both the near and long term as well as increased expectations of savings from energy efficiency.” (2009 Integrated Energy Policy Report, p. 3)

It also stated that: “A lower demand forecast would require fewer central station generating facilities within load pockets to satisfy reliability criteria.” (2009 IEPR, p. 176)

7. *Does the project have profound electricity reliability benefits?* No – I did not find any testimony indicating that the CECP had “profound electricity reliability benefits” of the nature attributed to the Metcalf project.
8. *Does the project provide significant transmission system benefits?* No – I did not find any testimony indicating that the CECP provided “significant transmission system benefits” of the nature attributed to other projects with an approved LORS override.
9. *Does the project result in improvements in electricity system operation?* Yes – As the Applicant, CEC staff, and CAISO witnesses have testified, the proposed CECP provide system benefits including quick start, ramping, and renewables integration capabilities. CEC staff witness Layton stated:

“The Carlsbad plant does meet some aspects of what the dispatchable generation would be expected to be in a higher-renewable, low-gHG environment. (RT, 2/03/10, p. 300.)

At the February 2010, the CAISO witness stated regarding the CECP that:

“The project as described is essential to the needs of California and to the electrical grid to meet the challenges that are presented by the new variable generation coming onto the system.” (RT, February 3, 2010, page 164, line 22)

The 2009 IEPR also noted the importance of various electricity system benefits as the system evolves to meet greenhouse gas emission reduction targets and increased dependence on renewables. In this report the Commission stated on pages 110 and 111 that:

...(A)s California's integrated electricity system evolves to meet GHG emissions reduction targets, the operational characteristics associated with increasing renewable generation will increase the need for flexible generation to maintain grid reliability. The report asserts that natural gas-fired power plants are generally well-suited for this role and that California cannot simply replace all natural-gas fired power plants with renewable energy without endangering the safety and reliability of the electric system. The report acknowledges that California will need to modernize its natural gas generating fleet to reduce environmental impacts, however. Overall, the report found that the future of natural gas plants will likely fill five auxiliary roles: 1) intermittent generation support, 2) local capacity requirements, 3) grid operations support, 4) extreme load and system emergencies support, and 5) general energy support.

The report also noted on page 111 however that: "The question remains as to the quantity, type, and location of natural gas-fired generation to fill remaining electricity needs once preferred resource targets are achieved."

This question of location required to providing the electricity system benefits attributed to the CECP was also raised during the evidentiary hearings. This testimony states that the attributes provided by the CECP, particularly renewables integration, can be provided by similar power plants at a variety of locations:

"MR. ROSTOV: Do you know how much generation is necessary for integrated renewables?"

MR. McCLARY: More than we have.

MR. ROSTOV: Do you know the locations for those type of plants?"

MR. McCLARY: Not specifically." (RT, 2/3/10, Page 296 Line 13)

In response to Mr. Rostov's question: "Did you show that this specific plant is critical to renewables integration?" Mr. Layton responded: "I believe the FSA analysis does not say that." (RT, 2/03/10, p. 311, ll. 15-18.)

Mr. Vidaver further explained that:

"The ability to incorporate renewables in large quantities into the system can be -- is a function that can be performed by power plants located virtually anywhere in California. The ability to provide dispatchable or dependable capacity in the San Diego local reliability area, and thereby retiring the existing units at Encina can be

accomplished, as far as I know, by any replacement capacity located anywhere in the San Diego area.

So to say that the Carlsbad energy project is critical is setting -- at the very least it's setting a standard that's not possible to meet. " (RT, 2/03/10, p. 325, ll. 14-25.)

According to SDG&E, the three PPA projects they selected through their procurement process also provide these electricity system attributes:

"Each of the three subject contracts are for environmentally friendly, quick start generation units utilizing the most advanced and efficient gas-fired technologies. They also provide the starting and/or ramping capabilities required by the Commission to accommodate sudden changes in resources or load. Further, these generation facilities provide flexibility that will help to mitigate the effects of intermittency associated with the increased deployment of renewable generation. In addition, each of these facilities will provide reliable capacity during periods of peak load." (Exhibit 453, page 5; see also Exhibit 452, page 5 and 6))

Timing is also an important consideration in evaluating a project's electricity system benefits. This consideration is discussed in relation to environmental benefits below.

10. *Will the project reduce the cost of electricity to consumers?* Unknown – NRG submitted the CECP in response to the 2006 Long-term Procurement Process and San Diego Gas & Electric Company's 2009 Request of Offers. SDG&E was allowed to procure up to 530 MW of new, local generation. In establishing its procurement guidelines, SDG&E used a "least cost – best fit" approach described in its testimony to the CPUC. (Exhibit 453, Page 26, beginning line 6) This assessment begins with an assessment of the cost of electricity from each proposal. Since the CECP was not selected through the RFO process, SDG&E is likely to have determined electricity was either more expensive than other proposals or there was some other concern that made electricity from the CECP less attractive to SDG&E and its ratepayers. However, since the electricity costs contained in the proposals are not public, conclusions related to this consideration are unknown.
11. *Will the project make substantial use of existing infrastructure?* No – The CECP will use some of the existing EPS infrastructure. This includes the existing transmission infrastructure to connect to the transmission system and the existing EPS intake and outfall discharge facilities to obtain ocean water. The generation equipment, natural gas pipeline, and transmission switchyard would be new. (CEC Staff, Carlsbad Energy Center Project Final Staff

Assessment, November 12, 2009, beginning page Project Description 3-1) In its Supplemental Testimony dated November 18, 2011, the Applicant stated that the:

“...CECP does not make substantial use of the existing EPS...” (page 4)

12. *Will the project reduce the impact of the existing power plant on the community through required removal of existing equipment, reduced stack height, etc.?* Uncertain – While the Applicant and staff assert that the CECP will result in the closure of Units 1-3 of the Encina Power Station, there had been no proposal to physically remove the existing EPS buildings and structures until hearings on the Presiding Members Proposed Decision. During those hearings the Applicant and City discussed, the Applicant proposed, and the City supported Conditions LAND-2 and LAND-3 as a vehicle to provide a greater public benefit from the project. These conditions were included on page 33 of the Errata to the PMPD and established the expectation that the project owner would:

- prepare a demolition, removal, and remediation plan,
- submit a study of the estimated cost of implementing the plan,
- demonstrate they had the fiscal ability to implement the plan,
- initiate a redevelopment process for the property,
- submit applications for the required permits and approvals, and
- begin implementation of the plan upon commissioning of the CECP and approval by the CPUC.

On page 3 of its Supplemental Testimony dated November 18, 2011, the Applicant now “...believes the complete removal of the Land Use Enhancement Conditions is most appropriate...” and proposes modifications to the conditions to remove certain financial burdens.

Because of the uncertainty over the status of LAND-2 and LAND-3, at this point it is uncertain whether the CECP will result in removal of any existing equipment other than the existing abandoned tanks.

13. *Will the project replace aging generation?* Yes – The Encina Power Station has been in operation since 1954. It is one of the oldest power plants in California and has lower efficiency and lower availability than most other facilities. As Robert Sparks stated in his testimony:

“(T)he ISO believes that either repowering at the existing Encina Power Station site or development of some project comparable to the proposed Carlsbad Energy Center will be necessary to allow the generating units at the Encina Power Station to comply with the OTC policy.” (Robert Sparks, pages 7 and 8)

The CEC staff have stated that construction and operation of the CECP will facilitate the retirement of EPS Units 1 to 3 (CEC Staff, Carlsbad Energy Center Project Final Staff Assessment, November 12, 2011, page Executive Summary 1-7) and could be initial steps that could lead to the retirement of all five EPS units (CEC Staff Supplemental Testimony, November 17, 2011, page 11).

The CECP, however, is not essential for the retirement of the Encina Power Station. SDG&E stated in its written testimony to the CPUC, that the results of its 2009 procurement factored in the ability to fully retire the EPS:

“These three PPTAs are needed to ensure there is adequate capacity in SDG&E’s service area for all customers, both bundled and direct access to meet local resource adequacy (“RA”) needs. Additionally, the new, locally sourced, long-term generation will help mitigate the effects of intermittency, facilitate the retirement of aging and Once Through Cooling (“OTC”) generation resources, and will comply with Greenhouse Gas (GHG”) requirements specified in D.07-01-039.” (Exhibit 453, page 3)

“... (W)ith the resource additions that are proposed in this Application, the SDG&E load pocket will have sufficient resources to meet total local RA needs for all customers. It also shows that sufficient resources would exist to allow for the full retirement of the Encina Power Plant prior to the end of 2017, the date at which it would need to meet the State’s new OTC policy.” (Exhibit 453, page 12 and 13)

14. *Does the project result in other environmental benefits?* Yes/No – Whether the CECP provides environmental benefits or significant adverse impacts is obviously in the eye of the beholder. The CEC Staff has concluded that the project will result in no significant adverse environmental benefits and represents a benefit in terms of:

- eliminating the daily need for millions of gallons of once-through ocean water cooling, and its associated fish impingement and biological impacts (CEC Staff Final Staff Assessment, November 12, 2009, page Executive Summary 1-7)
- accomplishing a brownfield redevelopment (CEC Staff Final Staff Assessment, November 12, 2009, page Executive Summary 1-7)
- reducing the use of ocean water for power plant cooling (CEC Staff Supplemental Testimony, November 17, 2011, page 11)
- allowing completion of the City’s Coastal Rail Trail (CEC Staff Supplemental Testimony, November 17, 2011, page 11)

- providing dollars for socioeconomic benefits. (CEC Staff Supplemental Testimony, November 17, 2011, page 11)
- Initiating steps that could lead to the retirement of all five EPS units, ultimately resulting in the redevelopment of over nearly 70 acres of existing industrial property (CEC Staff Supplemental Testimony, November 17, 2011, page 11)

The City has concluded that the project represents:

- significant visual impacts and questions the viability of proposed visual mitigation (Prepared Rebuttal Testimony of Donald Nue, January 4, 2010, page 2)),
- creates a fire protection and public safety concern (Prepared Direct Testimony of Kevin Crawford, Chris Heiser, and James Weigand, January 4, 2010),
- interferes with completion of the Coastal Rail Trail (Prepared Direct Testimony of Scott Donnell, January 4, 2010, page Donnell-17),
- contributes to blight (Prepared Direct Testimony of Debbie Fountain, January 4, 2010), and
- impedes their plans and vision for development within the coast (Prepared Direct Testimony of Lisa Hildebrand, January 4, 2010, pages 4 to 6)

The most significant potential environmental benefits of this project are eliminating the use of ocean water for cooling and contributing to the removal of the existing Encina Power Station. These benefits, however, are likely to be achieved regardless of the CECP because of the state's once-through cooling (OTC) policy and structure of our electricity market. With or without the CECP, the OTC policy requires reduction in the use of ocean water or closure of the EPS by 2017 unless the units are needed for reliability purposes. As noted above, the three projects selected by SDG&E through their procurement process were intended to provide sufficient local generation to meet local and regional reliability requirements and allow the EPS to retire (Exhibit 453, page 12 and 13).

Timing is an important factor in terms of achieving the OTC policy and removing the existing EPS. Retirement and then removal of the EPS is dependent on the CPUC and CAISO determining that the plant is no longer necessary to ensure electricity system reliability or provide ancillary services in the region. As discussed under the third factor above, SDG&E is proposing the three power purchase agreement projects to allow for retirement of the EPS. While there is some uncertainty regarding the operational dates for these facilities, it is very possible that they could be on line before the 2017 OTC closure target date.

It is unclear, however, when the CECP can be operational. Even if the Energy Commission approves the project in early 2012, the project may not be on line until 2015 at the earliest with an on line date of 2016 to 2020 being very possible. The three critical path items in terms of the CECP beginning a two-year construction period are receipt of an NPDES permit from the Regional Water Quality Control Board, PSD permit, and a power purchase agreement. The CEC staff implied that the PSD permit could be received in a matter of months in its supplemental testimony (Energy Commission Staff Response to Committee Order, November 18, 2011, pages 3 and 4) but the Applicant laid out a PSD permitting process that could take up to two years once they begin preparing the application (Carlsbad Energy Center LLC's Supplemental Testimony, Exhibits, Witness List, And Time Estimates For Examination Of Witnesses, November 18, 2011, pages 16 and 17).

The time required and ability to obtain a power purchase agreement is the greatest uncertainty. It could take two to six years for the CECP to obtain a power purchase agreement if they participate in a utility procurement process. Without a power purchase agreement, the Applicant has stated it will not be able to construct the CECP:

“Not unlike other new generation projects in the state, CECP will require a PPA with a load serving entity in order to secure project financing and commence construction. ... A PPA is the central document in the development and construction of independent (non utility owned) power plants and is a critical component to obtaining project financing.” (Carlsbad Energy Center LLC's Supplemental Testimony, Exhibits, Witness List, And Time Estimates For Examination Of Witnesses, November 18, 2011, page 6)

SDG&E noted the lack of a power purchase agreement and concerns over the status of the CECP in its testimony before the CPUC:

“First, the NRG repower proposal, called the Carlsbad Energy Center, has yet to receive CEC approval of the Application for Certification (AFC) which is required before any construction activities can begin. The facility is not under construction and, so far as SDG&E knows, no contracts exist to provide the revenue stream that would be needed to move the project forward. NRG testimony in this case specifically states that the Carlsbad Energy Center ‘may not reach fruition, as the project does not currently have a long term contract supporting its construction.’ The fact remains that the proposed Carlsbad Energy Center remains an uncertainty for various reasons.” (Exhibit 454, Page RA-18)

The importance of the CECP obtaining a power purchase agreement to provide any of the environmental or electricity system benefits ascribed to it was underscored by the CEC staff at the initial evidentiary hearing:

“MR. LAYTON: Again, if they are needed, they will get a power purchase agreement and they will operate. If they are not needed, they may not get a power purchase agreement and they will not operate.” (RT, 2/03/10, p. 258, ll. 21-24.)

“MR. VIDAVER: If San Diego Gas & Electric has said that it does not intend on entering into a power purchase agreement with a generator in the northern part of the county because it doesn't feel it's necessary, I would assume – I would conclude from that that San Diego doesn't feel it's necessary.” (RT, 2/03/10, p. 341, ll. 5-10.)

Considering my assessment of the factors above, I do not believe the CECP meets the same level local, regional, or statewide importance as previous LORS override cases and would not recommend that the Commission make an affirmative finding regarding a LORS override for the CECP.

Q11. Does that conclude your testimony?

A11. Yes.

Exhibit List

| <u>Exhibit No.</u> | <u>Description</u> | <u>Sponsor</u> |
|--------------------|--|----------------|
| 444 | City of Escondido approval of Escondido Energy Center Project, July 12, 2011 | Garuba |
| 445 | City of Escondido Staff Report on the Escondido Energy Center Project Dated July 12, 2011 | Garuba |
| 446 | Housing and Redevelopment Commission Resolution 513, dated September 20, 2011 | Fountain |
| 447 | Staff Report "Update Report on Proceedings before the CEC on September 19, 2011, Carlsbad Energy Center | Fountain |
| 448 | Ordinance CS-159, an ordinance approving an amendment to the Encina Power Station Precise Development Plan, dated October 11, 2011 | Ball |
| 449 | Ordinance CS-160, an ordinance approving an amendment to the Encina Specific Plan SP 144(N), dated October 11, 2011 | Ball |
| 450 | Prepared Track I Testimony of San Diego Gas & Electric Company, in R 10-05-006, July 1, 2011 | Therkelsen |
| 451 | Testimony of the 2010 Long-term Procurement Planning Track I System Plan of San Diego Gas & Electric Company, in R 10-05-006, dated August 5, 2011 | Therkelsen |
| 452 | Application of San Diego Gas & Electric Company for Authority to Enter Into Purchase Power Tolling Agreements with Escondido Energy Center. Pio Pico Energy Center and Quail Brush Power, dated May 19, 2011, Application A 11-05-023 | Therkelsen |
| 453 | Prepared Direct Testimony of San Diego Gas & electric Company in Support Of Application for Authority to Enter into Purchase Power Agreements With Escondido Energy Center, Pio Pico Energy Center and Quail Brush Power, dated May 19, 2011 in Application A 11-05-023 | Therkelsen |
| 454 | Rebuttal Testimony of Robert Anderson of Behalf of San Diego Gas & Electric Company in Support of Application of San Diego Gas & Electric Company for Authority to Enter into Purchase Power Tolling Agreements With Escondido Energy Center, Pio Pico Energy Center and Quail Brush Power, dated October 21, 2011, in A 11-05-023 | Therkelsen |

455 SDG&E's Response to City of Carlsbad Data Requests in A 11-05-023,
Dated September 6, 2011

Therkelsen

OFFICIAL NOTICE DOCUMENTS

Resolution 2011-230 A resolution approving a General Plan Amendment
And Local Coastal Program Amendment Regarding the Generation and
Transmission of Electric Energy, dated September 27, 2011 [Official Notice
Requested]

Ordinance CS-158 An Ordinance Approving an Amendment to Zoning
Ordinance Section 21.36.020 Table "A" regarding Generation and
Transmission of electrical Energy as Permitted Uses in the Public
Utility Zone, dated October 11, 2011 [Official Notice Requested]