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STATE OF CALIFORNIA

Energy Resources Conservation and
Development Commission

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

Docket No 07-AFC-6

**Brief of City of Carlsbad and Carlsbad Redevelopment Agency on LORS Conformance and Override Issues**

December 5, 2011

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## TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

II. THE CITY OF CARLSBAD ORDINANCES ARE VALID AND THE CECP WOULD VIOLATE THESE LORS IF CONSTRUCTED. ..... 2

III. IT HAS BEEN WELL ESTABLISHED IN THIS RECORD THAT THE CECP MUST COMPLY WITH THE PROVISIONS OF THE CARLSBAD REDEVELOPMENT AGENCY INCLUDING A FINDING OF "EXTRAORDINARY PUBLIC BENEFITS" FOR THE LOCAL POPULATION. ..... 4

IV. TO APPROVE THIS PROJECT, THE ENERGY COMMISSION MUST MAKE AN AFFIRMATIVE DECISION ON A LORS OVERRIDE BASED ON THE COMPLETE EVIDENTIARY RECORD. ..... 6

V. CONCLUSION ..... 10

ATTACHMENT 1: CITY OF CARLSBAD ORDINANCE NUMBER CS-138

ATTACHMENT 2: CITY OF CARLSBAD PROPOSED REVISION OF CONDITIONS LAND-2 AND LAND-3

## TABLE OF AUTHORITIES

### Cases

Avco Community Developers Inc. v. South Coast Regional Commission (1976) 17 Cal.3d 785 ..... 3

California Redevelopment Association v. Matosantos (2011) 12 Cal. Daily Op. Serv. 32 ..... 5

County of Solano v Vallejo Redevelopment Agency (1999) 75 Cal App.4th 1262 ..... 4

Federation of Hillside and Canyon Association v. City of Los Angeles (2004) 126 Cal.App.4th 1180 ..... 3

Hazon-Iny Development Inc. v. City of Santa Monica (1982) 128 Cal.App.3d 1 ..... 3

Kaufmann and Broad Central Valley Inc. v. City of Modesto (1994) 25 Cal.App.4th 1577 ..... 3

Midway Orchards v. County of Butte (1990) 220 Cal.App.3d 765 ..... 3

Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco (1967) 66 Cal.2d 34 ..... 2

West Coast Advertising Co. v. City and County of San Francisco (1967) 256 Cal.App.2d 357 ..... 2

### Statutes

20 California Code of Regulations section 1751 ..... 6

20 California Code of Regulations section 1752 ..... 6

Fire Code section 503.2.1 ..... 6

Fire Code section 503.2.2 ..... 6

Government Code section 65009 ..... 3

Government Code Section 66498.1 ..... 3

Health and Safety Code section 33000 ..... 6

Health and Safety Code section 33037 ..... 4

Health and Safety Code section 33131 ..... 4

Health and Safety Code section 34177 ..... 6

Public Resources Code section 21167 ..... 3

Public Resources Code section 25525 ..... 6

Public Resources Code section 30101 ..... 6

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

On December 12, 2011 the Assigned Committee determined that briefs, no more than 10 pages, are to be filed by the close of business on January 10, 2012. Due to the length requirements, the City of Carlsbad and the Carlsbad Redevelopment Agency hereby offer their views on three narrow issues:

1. The legality and applicability of the City's land use ordinances.

2. The importance of Conditions LAND-2 and LAND-3 as necessary to meet the Redevelopment Agency's "extraordinary public benefit" requirement and the inappropriateness of the Applicant's proposed modifications.

3. The lack of support in the evidentiary record for the CECP to meet the LORS override tests, namely, that the CECP is needed for public convenience and necessity **and** that there are no more prudent and feasible means of achieving this public convenience and necessity.

Finally, although we believe that PSD compliance is an important issue, we leave this issue to others.

The task facing this Committee and the Commission is to weigh the evidence of record and make specific required findings. In terms of the required finding on LORS conformance, the pathway starts with the recognition that, at a minimum, the City of Carlsbad ordinances CS-159 and CS-160 and Resolution 2011-230 are legal. In addition, the City believes the Committee and Commission must find that the proposed CECP project fails to provide extraordinary public benefit required by the South Carlsbad Coastal Redevelopment Plan, the coastal dependency requirement of the California Coastal Act, and the access requirements of the State Fire and Safety Code.

Following recognition of one or more of these nonconformities, the Commission may determine that it wants to evaluate whether an "override" should be considered. An override is a serious action (especially when overriding LORS as opposed to environmental impacts), and the Commission has considered overrides in a very few instances.

If the Commission deems it prudent to evaluate whether an override is appropriate in this case, it must then make the following findings:

1. *That the public convenience and necessity requires the capacity and energy represented by the CECP*. - The recently issued Lead Commissioner Draft IEPR cannot support a public convenience and necessity claim, and, in addition, if there is a perceived need, the three signed PPA projects represent the "least cost/best fit" solution.

2. *If the Commission determines that the public convenience and necessity demand additional power plants, the Commission must then make the determination that there are not more prudent and feasible means of providing and perceived energy need*. -

The three SDG&E PPA's represent SDG&E preferred resources as alternatives and they have fewer environmental impacts and are not located in the coastal zone compared to the CECP.

We believe that the evidence of record cannot support an override.

## II. THE CITY OF CARLSBAD ORDINANCES ARE VALID AND THE CECP WOULD VIOLATE THESE LORS IF CONSTRUCTED.

The recent City of Carlsbad land use LORS amendments that were the subject of the evidentiary hearing of December 12, 2011 and their effective dates were summarized in the testimony of Mr. Ball as follows:

| Legislative Action No. | Substantive Amendment | Effective Date |
|---|---|---|
| Ordinance CS-158 | Zoning ordinance amendment amending the PU Zone to prohibit certain power plants. | Final Action taken by City Council on October 11, 2011. Needs Coastal Commission approval. |
| Ordinance CS-159 | Amendments to the Precise Development Plan clarifying that the proposed power plant is inconsistent with the General Plan and zoning ordinance. | November 11, 2011 |
| Ordinance CS-160 | Amendment to the Encina Specific Plan clarifying that power plants are prohibited within the specific plan and stating the height limit of 35 feet. | November 11, 2011 |
| Resolution 2011-230 | Amendment to the General Plan PU designation, establishing, clarifying and re-stating that proposed power plants exceeding 50 megawatts are not permitted in the Coastal Zone. | September 27, 2011 |

These legislative acts are LORS and applicable to the pending proceedings.

It has long been established that legislation is effective to pending applications unless the legislation itself establishes a different date or it disturbs vested rights. (Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco (1967) 66 Cal.2d 34; West Coast Advertising Co. v. City and County of San Francisco (1967) 256 Cal.App.2d 357.) In these proceedings, there is no issue of whether or not these legislative amendments apply retrospectively since they only apply prospectively to the pending application. So, unless the legislative body itself (in this case the City Council) provides otherwise, the legislative amendments are applicable to pending applications. Were it otherwise, there would be a myriad of laws applicable to pending permits depending on when they were filed. (In accord the Commission's decision on Chula Vista Energy Upgrade Project, Application No. 07-AFC-4.)

The amendment to a General Plan is a legislative act which is presumed valid, and another agency or the court cannot inquire into the wisdom of that legislative act or review the merits of the local government's policy decisions. (Federation of Hillside and Canyon Association v. City of Los Angeles (2004) 126 Cal.App.4th 1180.)

It is standard statutory interpretation that the legislative enactment will be interpreted by its plain and ordinary language and that secondary resources are not needed unless there is absolutely no public purpose. In this case, the public purpose is clear. The legislative body has taken steps to make it clear that the proposed power plant cannot be permitted in the coastal zone or at this particular site. Whether or not one agrees with this legislative outcome is irrelevant since the law is clear and speaks for itself.

There are no vested rights at issue in the proceedings.

Generally, a vested right can be established only after a permit is issued and only after an applicant expends substantial liabilities in good faith reliance on that permit. Hazon-Iny Development Inc. v. City of Santa Monica (1982) 128 Cal.App.3d 1, Avco Community Developers Inc. v. South Coast Regional Commission (1976) 17 Cal.3d 785. Soft costs incurred by a developer do not constitute detrimental reliance for purposes of determining whether or not a vested right has matured.

Nothing in the Warren-Alquist Act specifies the applicability of effective dates of legislation adopted by a local agency.

A review of the Warrant-Alquist act reveals that nowhere does it provide for dates of applicable LORS. If the state legislature had intended otherwise, it could have specified a date or dates for the effectiveness of LORS. Indeed it has done so in other areas (e.g. vesting tentative maps under the Subdivision Map Act Government Code Section 66498.1(b)), Kaufmann and Broad Central Valley Inc. v. City of Modesto (1994) 25 Cal.App.4th 1577. [1]

Applicant's remedy is to sue for a writ of mandate if it believes the City's LORS amendments are illegal or unconstitutional.

Since the City of Carlsbad's land use LORS amendments can only be overturned by a subsequent act of the legislative body (the City Council) or overturned by a court of competent jurisdiction, applicant's remedy is to file a lawsuit challenging them. Applicant's opportunity to file a CEQA challenge has run (30 days from the adoption of the lead agency's approval of the CEQA documents. PRC §21167(b). It has 90 days from the adoption of the zoning amendments, Government Code section 65009(c)(1). It had 30 days from the adoption of the General Plan Amendment (Midway Orchards v. County of Butte (1990) 220 Cal.App.3d 765).

[1] When asked by Associate Member Douglas the fundamental reason for arguing that the LORS were not effective, applicant's expert based it on the preemptive nature of the Warren-Alquist Act and a belief that the rules and regulations that existed at the time of the application would be the effective ones. Nothing in the Act supports this. (Reporter's Transcript of December 12, 2011 Evidentiary Hearing, Pages 272 and 273.)

## III. IT HAS BEEN WELL ESTABLISHED IN THIS RECORD THAT THE CECP MUST COMPLY WITH THE PROVISIONS OF THE CARLSBAD REDEVELOPMENT AGENCY INCLUDING A FINDING OF "EXTRAORDINARY PUBLIC BENEFITS" FOR THE LOCAL POPULATION.

California Community Development Law establishes as state policy the goal to protect and promote the sound development of blighted areas in communities in California. (Cal Health and Safety Code §33037) Local communities are directed to achieve redevelopment "through all appropriate means" (Cal Health and Safety §33037 (a)) and redevelopment agencies are directed to "prepare and carry out plans for the improvement, rehabilitation and redevelopment of blighted areas" (Cal Health and Safety §33131). The City of Carlsbad is one of California's communities that created a redevelopment agency and has created planning documents to guide the redevelopment process. The Redevelopment Agency is not part of the city, but a separate body under state law (County of Solano v Vallejo Redevelopment Agency (1999) 75 Cal App.4th 1262, 1267. The principal redevelopment planning document is the South Carlsbad Coastal Redevelopment Plan (SCCRP), approved in 2000 and amended in 2005 (City of Carlsbad, Prepared Testimony of Debbie Fountain, January 2010, page Fountain 2). While Redevelopment Law was amended in June, 2011 to dissolve redevelopment agencies as of February 1, 2012, redevelopment law and the SCCRP was not repealed by this action. The City of Carlsbad has been approved as the Successor Agency, and as such has the legal obligation to address enforceable obligations of the redevelopment agency which include statutory obligations.[2] This authority to enforce the requirements of redevelopment law and the SCCRP is discussed further below.

The major reason the CECP violates redevelopment policy and LORS is that it adds to, not diminishes, blight.

The SCCRP contains a number of goals and policies, including the elimination of blight, developing new beach and coastal recreational opportunities and the facilitation of redevelopment of the Encina power generating facility to a smaller, more efficient plant. While the proposed CECP needs to apply and receive a redevelopment permit, it has never done this. In reviewing the CECP through the Energy Commission's siting process, the Redevelopment Agency has concluded that the CECP does not satisfy the policy concerns or legal requirements of the South Carlsbad Coastal Redevelopment Plan, does not meet the requirements or expectations with regard to the smaller more efficient plant[3], and contributes to greater blight. There will now be two power plants on the coast rather than a single plant.

The CECP also fails to meet the "extraordinary public benefit" requirement. CECP has claimed a number of benefits resulting from the construction and operation of the plant that rise to the level of "extraordinary". There are a few minor benefits (e.g., EPS 1-3 retirement, more efficient

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[2] Ordinance Number CS-138 adopted on April 26, 2011, established the City Council as the successor agency to the Housing and Redevelopment Commission. It is attached hereto and moved to be officially noticed.

[3] The Redevelopment Agency contemplated a small power plant enclosed in a Class A building, not (2) 140 foot exhaust stacks and (2) 75 foot HRSGs in an exposed condition. (See City of Carlsbad Prepared Testimony, January 2010, page Fountain 4)

plant), a number of items that represent typical but not extraordinary benefits (e.g., taxes, local reliability, lead to EPS demolition, etc.). Exhibit 447 is a Redevelopment Staff report analyzing these "benefits" and lead to a conclusion by the Agency that the CECP does not provide an extraordinary public benefit.

Conditions LAND-2 and LAND-3 are necessary but not sufficient to meet the "extraordinary public benefit requirement.

The City and Redevelopment Agency believe that Commissioner Boyd urged an agreement on an Encina demolition plan to provide local benefits and minimize the presence of power plants in the coastal zone. The PMPD Errata proposed conditions LAND-2 and LAND-3 and concluded that they "offer an opportunity to assure the timely removal and redevelopment of the portion of the EPS site to the west of the rail lines . . ." (Errata, page 31) Acceptable Conditions of Certification LAND-2 and LAND-3 would, in addition to helping meet the "extraordinary public purpose" test, assure that there would not be two power plants on the coast for an extended period of time. While the City does not want any power plants in the coastal zone, avoiding two plants is of critical importance.

Although the City and Redevelopment Agency did not believe the Committee's proposed conditions went far enough, CECP subsequently recommended "taking the teeth" out of these LAND conditions. The only commitment CECP is now offering is to request permission to retire the EPS when the CECP becomes operational. There is no commitment to actually retire and demolish the EPS. These "gutted" Land Use conditions cannot support either the requirements of the City's redevelopment regulations or provide the local benefits sought by Commissioner Boyd. They rather insure that there will be two power plants in the redevelopment area for the foreseeable future, which is exactly the type of blighting the SCCRA is trying to avoid.

Rather than weakening the proposed LAND conditions, the City recommends the Committee strengthen Conditions LAND-2 and LAND-3 to add more specific performance requirements and clarify that demolition, removal, and remediation obligations are to be fulfilled by the CECP project owner and/or the owner of the Encina Power Station. These proposed modifications are included as Attachment 2. The City believes these modifications in the conditions proposed by the Committee in its PMPD Errata is a necessary, although not sufficient by itself, step for satisfying the extraordinary public benefit requirement. In previous testimony and briefs, the City and Redevelopment Agency have explained what other actions are necessary to fully satisfy this requirement.

The Redevelopment requirements including extraordinary public benefit continue until the state or another legislative body provide otherwise.

The Redevelopment requirements including the requirement for an extraordinary public purpose is contained in the redevelopment plan for the South Carlsbad Coastal Redevelopment project area. That plan has not been repealed nor has the redevelopment law. Instead the California Supreme Court has determined that Redevelopment Agencies shall be wound up and dissolved under its interpretation of ABX1 26 and ABX1 27. (California Redevelopment Association v. Matosantos (2011) 12 Cal. Daily Op. Serv. 32) Under AB X1 26 the requirements of law of the redevelopment agency shall now be met by a successor agency. That successor agency has

already been declared by ordinance to be the City Council.[4] It is required to carry out those duties imposed by law on it by Health & Safety Code section 34177(c). In addition, the General Plan and Zoning Ordinance will be amended to continue to require extraordinary public benefits.

## IV. TO APPROVE THIS PROJECT, THE ENERGY COMMISSION MUST MAKE AN AFFIRMATIVE DECISION ON A LORS OVERRIDE BASED ON THE COMPLETE EVIDENTIARY RECORD.

The City of Carlsbad believes the record fully supports at least four areas where the proposed CECP violates state, local, and regional LORS:

1. The requirement of coastal dependency as established by the California Coastal Act.[5] (Pub. Res. Code § 30101)

2. The unobstructed fire access requirements established by the City of Carlsbad City Ordinance and the Carlsbad fire code official as allowed by the California Fire Code.[6] (Carlsbad City Ordinance CS-126, § 503.2.1; California Fire Code §§ 503.2.1 and 503.2.2)

3. The requirement to provide an "extraordinary public benefit" to the local area as established by the South Carlsbad Coastal Redevelopment Plan and supported by the California Redevelopment Act.[7] (South Carlsbad Coastal Redevelopment Plan and California Health and Safety Code § 33000, *et seq.)*

4. The City of Carlsbad General Plan and Land Use Ordinances. (see discussion above)

5. The requirement for a 35' height limitation. (Agua Hedionda Land Use Plan Page 17 § 1.9; Exhibit 412)

To override these LORS, the Commission must make two specific findings: (1) that the public convenience and necessity require the CECP **and** (2) that there are no more prudent and feasible means of achieving that public convenience and necessity. These findings, as required by the Warren Alquist Act (Pub. Res. Code § 25525; 20 Cal. Code Reg., § 1752(k)), are to be "…based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application." 20 Cal. Code Reg., § 1751(a).

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[4] Ordinance Number CS-138 adopted on April 26, 2011, established the City Council as the successor agency to the Housing and Redevelopment Commission. It is attached hereto and moved to be officially noticed.

[5] See testimony of former Coastal Commission Chief Counsel Ralph Faust (Exhibit 433, page Faust-9), City of Carlsbad Opening Brief (August 18, 2010, page 70), City of Carlsbad Comments on the PMPD (June 8, 2011, page7), and City of Carlsbad Comments on PMPD following the Business meeting (June 27, 2011, page 2).

[6] See testimony of Carlsbad Fire Chief Crawford (Tr. May 19, 2011, Page 127) and City of Carlsbad Comments on the PMPD (June 8, 2011, page11) and City of Carlsbad Comments on PMPD following the Business meeting (June 27, 2011, page 5).

[7] See testimony of Murray Kane (Exhibit 433, page Kane-7) and Debbie Fountain (Exhibit 433, page Fountain-5), City of Carlsbad Opening Brief (August 18, 2010, page 60), and City of Carlsbad Comments on the PMPD (June 8, 2011, page15), and City of Carlsbad Comments on PMPD following the Business meeting (June 27, 2011, page 7).

In prior decisions, the Commission has referred to the use of a LORS override as "…an extraordinary measure which…must be done in as limited a manner as possible." (Metcalf Final Decision, page 469) The evidentiary record does not justify use of this extraordinary measure for the CECP. Instead of describing a critical and compelling need for the project, the evidence presents uncertainty regarding the future needs of the electricity system, the availability of a number of options, and time to resolve these concerns in a deliberate process.

This perspective is reflected in the Commission's draft 2011 Integrated Energy Policy Report. The report does not identify any urgent state or regional necessity that can justify an override finding (TR, 12/12/11, pages 33 to 35). It does note that while each agency "…can make their own decisions about portions of the new infrastructure that will be needed…" they should make their decisions in a coordinated forum using an evidence based process (CEC, Draft 2011 Integrated Energy Policy Report, page 12).

The variety of views about electricity system needs is demonstrated in testimony from various technical experts. SDG&E's filings (Exhibits 450 and 453) and particularly its October 21, 2011 testimony (Exhibit 454) state that the three PPA projects are sufficient to meet regional needs through 2020 and allow for the retirement of the Encina Power station. The DRA's testimony (Exhibit 451) questions SDG&Es assertion that new generation is necessary to accomplish this objective and meet regional needs. The earlier CEC testimony by Mr. Vidaver states the CECP is not critical for renewables integration (RT, 2/03/10, p. 325, ll. 14-25). The recent CEC testimony by Dr. Jaske identifies numerous uncertainties regarding the future of the electricity system (Exhibit 230) and concludes that "there are a variety of ways in which preferred policy of the state are reflected in different vintages of analyses, and coordinating is still not fully complete." (TR, 12/12/11, page 15.)

The CAISO presented the most conservative picture of future electricity needs in the San Diego region and the Encina area. According to an analysis presented by Mr. Sparks, between 231 and 531 MW will be needed in the Encina area in 2020-21 (TR, 12/2/11, page 61). The Commission must be extremely cautious, however, about putting significant weight on this analysis as a justification for a CECP override. A 296 page PowerPoint presentation containing this analysis was released four days before the hearing. According to Dr. Jaske, it is a preliminary analysis based on "four different…renewable development patterns, none of which are certain" (TR, 12/12/11, page 53, line 7). The scenario was based on the CEC's 2009 demand forecast (TR, 12/12/11, page 63, line 19) and did not consider continued operation of Encina Power Station Units 4 & 5 (TR, 12/12/11, page 60 and 61) as asserted by NRG. As Dr. Jaske explained:

> "We haven't had this analysis before. We haven't understood that there are these issues that -- that need to be explored and to understand the degree to which they are uncertain. And so these multiple scenarios, you know, are a way of testing the extent to which these local capacity requirements differ across these different renewable build- out scenarios." (TR, 12/12/11, page 110, line 16.)
>
> "We're -- we're just now at the beginning stage of really understanding what the suite of choices are to be satisfied and -- and -- and transmission options, which haven't yet been fully assessed and serviced to the public." (TR, 12/12/11, page 123, line 23.)

The CAISO has not yet prepared a report describing their analysis and the underlying assumptions. The December 8, 2011 presentation, however, has been the subject of comments from numerous parties including staff of the CPUC (see official notice request of January 9, 2012). The CPUC staff listed six major areas that require further exploration, including the methodology for assessing state power needs resulting from the eventual retirement of OTC plants. These and other comments illustrate the very preliminary nature of the CAISO study. It also demonstrates that the Commission should exercise an abundance of caution relying on its results in this proceeding.

While Dr. Jaske initially recommended the Commission license the CECP, he did so as a electricity system planner to "maximize options going forward" in light of "…both the uncertainty of future developments and -- and the technical uncertainties of the analyses or -- or different options and choices…" (TR, 12/12/11, page 15, line 12). He did not base his recommendation on any sense of immediate urgency or necessity. Similarly Mr. Sparks stated that there is time in this planning cycle to look at other options including transmission upgrades (TR, 12/12/11, page 111).

The state has established a forum to understand the uncertainties raised by Dr. Jaske, consider the preliminary analysis prepared by the CAISO, and balance all of the variables associated with the electricity system: demand forecast, grid reliability and renewable integration concerns, OTC retirement policy implications, long-term transmission and generation options, energy efficiency, grid-reliability, renewables integration, OTC plant retirement, and rate-payer costs. As Mr. Therkelsen testified, currently that forum is the CPUC's long-term procurement planning process. (TR, 12/12/11, pages 184, 185.) Dr. Jaske explained that the CEC's demand forecast and planning assumptions from the Integrated Energy Policy Report are used the CPUC's process (TR, 12/12/11, page 63, line 9) and the CAISO's transmission planning analysis will be submitted as testimony in the CPUC's process (TR, 12/12/11, page 64, line 8). The entity responsible for procuring the necessary resources resulting from this process for the San Diego area is San Diego Gas and Electric Company.

Following the extensive discussion on the various perspectives, options, and processes for resolving the concerns, Dr. Jaske stated:

> "I think it's my testimony that there is a considerable range of uncertainty about the need for any of these resources, the alternative or the (CECP) project, or the possibility that all of them are needed." (TR, 12/12/11, page 169, line 20.)

One local reliability concern identified by the CAISO was the potential of a near-term Category C outage. The CAISO indicated that this problem could be resolved by 20 MW of additional generation in the "Encina sub-area"[8]. This concern, however, hardly justifies construction of a 560 MW power plant. SDG&E stated its intent to respond to this concern through a $1 million transmission adjustment (Exhibit 455, page 5), which CAISO acknowledged could potentially eliminate the problem (TR, 12/12/11, page 110, line 15).

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[8] See CAISO, 2013-2015 Local Capacity Technical Analysis, Report and Study Results, December 30, 2010.

The issue of a power purchase agreement was raised several times during this proceeding. Although the CEC is no longer required to examine the "need" for a project during a routine siting case, the question of need directly relates to the Commission's findings related to the necessity, prudency, and feasibility of a project and hence is a primary consideration when contemplating the use of a LORS override. In today's electricity market, the primary indicator of a power plant project's feasibility is a power purchase agreement. As the Applicant testified: "…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." (Exhibit 199P, page 6) The CECP was not selected by SDG&E or any other utility in the recent procurement process. This is a clear indicator that the host utility does not believe the CECP is necessary and is currently not feasible. While the PPAs for the projects selected by SDG&E have not yet been approved by the CPUC, these three projects were successful in the procurement process and have utility contracts – clear indicators that the host utility considers them to be more prudent and feasible than the CECP.

The three PPA projects represent the "no project alternative" under CEQA and are also feasible from an environmental and permitting perspective. Contrary to the testimony by Mr. Monasmith (TR, 12/12/11, page 69), the CEC staff defined the "no project alternative" in its Final Staff Assessment. In November 2009, it stated:

> "Although the identification of a definite No Project Alternative development scenario is not possible, "No Project" would almost certainly result in efforts to find new sites for dispatchable gas-fired generation that would meet similar project objectives to those of the CECP – providing load pocket reliability and reducing OTC with ocean water. To meet such objectives, the new generation sites would have to be in the San Diego urban area." (CEC, Final Staff Assessment, page Alternatives 6-18)

The three PPA projects meet the CEC staff's definition of the no project alternative but, while staff did update their cumulative impact analysis to reflect air quality and GHG impacts of the CECP and three PPA projects, they did not update their no project alternative analysis nor did they perform a complete assessment of the three PPA alternatives in their supplemental testimony. As discussed in the testimony of Mr. Hogan[9], this does not comply with CEQA and the Commission should not rely on the CEC staff's documents.

The only alternatives analysis the Commission can rely on to meet the requirements of CEQA was prepared by Mr. Garuba. Using an approach similar to that used by the CEC staff in the FSA, Mr. Garuba evaluated the three PPA project based on available information and conversations with the host local governments (City of Carlsbad Supplemental Testimony, December 5, 2011). He testified that these facilities are feasible alternatives and preferable to the CECP. They are able to meet the project objectives, have utility contracts in the process of being reviewed, have necessary environmental approvals or are being reviewed, provide quick start and ramping capability, support renewable integration, are supported by the local

[9] Testimony of Mike Hogan was submitted on December 5, 2011 as part of the City of Carlsbad Supplemental Testimony. The Committee accepted this testimony as a brief at the Prehearing Conference on December 9, 2011.

governments, are not located in the coastal zone, and do not have any unresolvable LORS conformance issues identified at this point.

## V. CONCLUSION

In summary, the question before the Commission is whether the evidentiary record justifies approval of the CECP in spite of conflicts with other state and local requirements and policy objectives. The record does not demonstrate a necessity for the project – it demonstrates multiple policy considerations, uncertain need, many available options, and time to exercise a deliberate process. The draft 2011 IEPR urges state agencies to adopt "a new interagency mechanism…to coordinate broader policy decisions that are beyond the focus of a single agency.[10]" The Commission should follow that advice in this case.

DATED: January 10, 2012

/s/ Ronald R. Ball
City Attorney, City of Carlsbad
& General Counsel, Carlsbad Redevelopment Agency

[10] Draft 2011 Integrated Energy Policy Report, page 12.

# ATTACHMENT 1

# CITY OF CARLSBAD
# ORDINANCE NUMBER CS-138

Exhibit 1

**ORDINANCE NO.** CS-138

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARLSBAD, CALIFORNIA, ESTABLISHING THE CITY OF CARLSBAD AS THE SUCCESSOR AGENCY TO THE FORMER REDEVELOPMENT AGENCY AND OVERRULING STATE LAW WHICH WOULD INTERFERE WITH THOSE MUNICIPAL AFFAIRS

WHEREAS, at the election of June 3, 2008, the citizens of Carlsbad declared their independence from state laws interfering with the conduct of their municipal affairs; and

WHEREAS, the preamble to the Charter of the City of Carlsbad sets forth the intent of the citizens in adopting a charter as follows:

> "We the people of the City of Carlsbad, declare our intent to maintain in our community the historic principles of self-governance inherent in the doctrine of home-rule. We the people of Carlsbad, are sincerely committed to the belief that local government has the closest affinity to the people governed and firmly convinced that the economic and fiscal independence of our local government will better serve and promote the health, safety and welfare of all the citizens of Carlsbad. Based on these principles, we do hereby exercise the express right granted by the Constitution of the State of California and do ordain and establish this Charter for the City of Carlsbad."

WHEREAS, section 100 of the Charter specifies the powers of the City to adopt, make, exercise and enforce all legislation, laws and regulations with respect to municipal affairs subject only to the limitations and restrictions as may be provided in this Charter, in the Constitution of the State of California and in the laws of the United States; and

WHEREAS, section 400 of the Charter provides that subject to the expenditure limitations established by the citizens of Carlsbad in 1982, the City shall have the power to utilize revenues from the General Fund to encourage, support and promote economic and community development in the City; and

WHEREAS, section 404 of the Charter provides plenary power to the City Council to establish standards, procedures, rules and regulations regarding all aspects of the award and performance of contracts; and

WHEREAS, section 500 prohibits the reductions in revenue due to or raised by the City and requires that it will remain within the boundaries of the City of Carlsbad for appropriation solely by the City Council. That section further provides that no such revenue shall be subject to subtraction, retention attachment, withdrawal or any other form of involuntary reduction by any other level of government; and

WHEREAS, section 600 provides that in the event of any conflict between the provisions of this Charter and the provisions of the general laws of the State of California, the provisions of this Charter shall control; and

WHEREAS, the City Council has exercised its sovereign powers and immunities in the course and control of municipal affairs since the adoption of the City Charter in the following ways:

1. Adopted an ordinance reinstituting the majority of the quorum (CS-001)
2. Adopted a prevailing wage ordinance (CS-047).
3. Adopted design build law ordinance (CS-046).
4. Amended the purchasing ordinance to streamline contracting and purchasing (CS-002).
5. Adopted an ordinance setting forth qualifications to run for City Treasurer and City Clerk CS-080 and 042).
6. Adopted an ordinance setting eligibility requirements for holding office (CS-023).

7. Amended the municipal code to eliminate General Plan conformance findings by the Planning Commission (CS-071).

WHEREAS, the Redevelopment Agency of the City of Carlsbad has, by contract, transferred its assets, including its real properties, to the City of Carlsbad for the performance redevelopment and housing activities and the furtherance of its municipal affairs as determined by the City Council; and

WHEREAS, certain provisions of these bills violate the State of California and United States Constitutions including California Constitution Article 11, section 5 which provides that a charter city may make and enforce all ordinance and regulations in respect to municipal affairs and that the powers granted under this provision shall supersede all inconsistent general laws with respect to municipal affairs; and

WHEREAS, there are pending before the California Legislature several bills which would make major intrusions into the municipal affairs of the City of Carlsbad including Assembly Bill 101 and Senate Bill 77; and

WHEREAS, these proposed laws would interfere with municipal affairs of the City of Carlsbad in that they would purport to void existing contracts, place other levels of government or entities in charge of municipal affairs, would require the disposition of local assets, including real properties, intended for use in carrying out municipal affairs and reduce or eliminate revenue needed for the carrying out of municipal affairs including the housing and redevelopment functions for the betterment of the citizens of Carlsbad.

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NOW, THEREFORE, the City Council of the City of Carlsbad ordains as follows:

SECTION I: That the above recitations are true and correct.

SECTION II: The City of Carlsbad is hereby named as the successor agency to the former Redevelopment Agency of the City of Carlsbad.

SECTION III: Title 23 of the Carlsbad Municipal Code is enacted to read as follows:

**Chapter 23.01 – <u>City Council Redevelopment Authority</u>**

A. Proposed state laws in the form of AB 101 or SB 77 or any substantially similar legislation purporting to interfere with the municipal affairs of the City of Carlsbad including any which void local contracts for the performance of municipal affairs for health and safety, redevelopment and housing purposes shall not operate and are ineffective within the municipal boundaries of the City of Carlsbad.

B. The City Council of the City of Carlsbad shall use the assets, properties, leases, contracts, and other resources of the former redevelopment agency for the health and safety, housing and other necessary and appropriate, policies and programs, as determined by the City Council to increase standards and qualities of the public good for the citizens of Carlsbad and to assist in carrying out the municipal affairs of the City of the Carlsbad without interference or intrusion of the State.

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EFFECTIVE DATE: This ordinance shall be effective thirty days after its adoption; and the City Clerk shall certify the adoption of this ordinance and cause it to be published at least once in a newspaper of general circulation in the City of Carlsbad within fifteen days after its adoption.

OPERATIVE DATE: This Title shall become operative only in the event of the adoption of Assembly Bill 101, Senate Bill 77 or similar legislation that interferes with the municipal affairs of the City of Carlsbad.

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INTRODUCED AND FIRST READ at a Regular Meeting of the Carlsbad City Council on the 5th day of April, 2011, and thereafter.

PASSED, APPROVED AND ADOPTED at a Regular Meeting of the City Council of the City of Carlsbad on the 26th day of April, 2011 by the following vote to wit:

AYES: Council Members Hall, Kulchin, Blackburn, Douglas and Packard.

NOES: None.

ABSENT: None.

ABSTAIN: None.

APPROVED AS TO FORM AND LEGALITY

RONALD R. BALL, City Attorney

4-27-11

MATT HALL, Mayor

ATTEST:

LORRAINE M. WOOD, City Clerk

(SEAL)

# ATTACHMENT 2

# CITY OF CARLSBAD
# PROPOSED REVISION OF
# CONDITIONS LAND-2 AND LAND-3

**ATTACHMENT 1B**

**CITY OF CARLSBAD**
**PROPOSED REVISION OF CONDITIONS LAND-2 AND LAND-3**

Note: The City's proposal for LAND-2 reflects the following modifications:

- Obligations previously identified as being performed by the CECP project owner now being performed by the CECP project owner and/or the owner of the Encina Power Station.

**LAND-2**

On or before January 1, 2016, the project owner and/or the owner of the Encina Power Station (EPS) shall prepare and submit a Demolition, Removal, and Remediation Plan (DRRP) to the CPM, the City of Carlsbad, and the Carlsbad Redevelopment Agency. The DRRP shall propose the process, schedule, and legal requirements for the demolition, removal, and remediation of the EPS (Units 1 through 5), associated structures, the black start unit and the exhaust stack. As part of completion of the DRRP, project owner shall consult with the California Energy Commission, the California Coastal Commission, the City of Carlsbad, the Carlsbad Redevelopment Agency, the San Diego Regional Water Quality Control Board, the San Diego Air Pollution Control Board, and the California Independent System Operator to ensure the DRRP best reflects the procedural and substantive requirements that apply to the site.

On or before January 1, 2017, project owner and/or the owner of the EPS shall prepare and submit to the CPM and the City of Carlsbad a study of the estimated costs associated with implementing the DRRP.

The project owner and/or the owner of the EPS shall demonstrate, to the CPM's satisfaction, fiscal capability to implement the DRRP prior to commencement of demolition activities. Such demonstration could be accomplished by submittal of a financial plan, deposit of funds into a dedicated account, or any combination thereof.

Concurrent with submittal of the DRRP, or by a date mutually agreed to by project owner and the Carlsbad Redevelopment Agency, the project owner and/or the owner of the EPS shall initiate the process with the Carlsbad Redevelopment Agency for redeveloping the existing EPS area by submitting a redevelopment application.

Note: The City's proposal for LAND-3 reflects the following modifications:

- Obligations previously identified as being performed by the CECP project owner now being performed by the CECP project owner and/or the owner of the Encina Power Station.
- The obligation to seek a determination from the CPUC for closure of the EPS either upon commencement of construction of the CECP or a date certain and before seeking all other permits and approvals.
- Separate demolition of the black start unit from demolition of EPS Units 1 through 5 since the black start unit may be needed for reliability purposes longer than the EPS and hence delay demolition of the EPS.
- Establishment of a date for completion of the demolition, removal, and remediation of the EPS.

**LAND-3**

Upon the commencement of construction of the project or no later than July 1, 2016, whichever comes first, the project owner and/or the owner of the Encina Power Station (EPS) shall request from the California Public Utilities Commission a determination on the ability to permanently shut down Units 1 through 5 at the Encina Power Station based on current and projected electricity system needs. This request shall be submitted annually until authorization to shut down the Encina Power Station is received.

Within six months following receipt of the CPUC approval for the shutdown of EPS Units 1 through 5, the project owner and/or owner of the EPS shall submit applications for required permits and approvals for demolition, removal, and remediation of the EPS Units 1 through 5, associated structures, and the exhaust stack.

Within six months following the shutdown of Units 1 through 5 at Encina Power Station pursuant to and in compliance with all permits and approvals necessary to perform such activities, the owner of the EPS shall commence demolition, removal, and remediation of the Encina Power Station Units 1 through 5, all associated structures, the black start unit and the exhaust stack. Demolition, removal, and remediation of the EPS will be completed within 36 months from the start of demolition.

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**
**1516 NINTH STREET, SACRAMENTO, CA 95814**
**1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION FOR THE *CARLSBAD ENERGY CENTER PROJECT***

**Docket No. 07-AFC-6**
***PROOF OF SERVICE***
**(Revised 11/29/2011)**

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*indicates change

## DECLARATION OF SERVICE

I, Flora Waite , declare that on, January 10, 2012, I served and filed copies of the attached Brief of City of Carlsbad and Carlsbad Redevelopment Agency on LORS Conformance and Override Issues dated January 10, 2012.

The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/carlsbad/ index.html]**.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

**(*Check all that Apply*)**

**For service to all other parties:**

_X_ Served electronically to all e-mail addresses on the Proof of Service list;

____ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses marked "hard copy required."

***AND***

**For filing with the Docket Unit at the Energy Commission:**

____ by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method); ***OR***

____ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

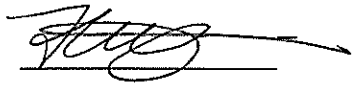
**CALIFORNIA ENERGY COMMISSION – DOCKET UNIT**
Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

***OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:***

____ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
mlevy@energy.state.ca.us

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



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