

**STATE OF CALIFORNIA**  
**Energy Resources Conservation**  
**and Development Commission**

<b>DOCKET</b>	
<b>07-AFC-6</b>	
DATE	JUN 08 2011
RECD.	JUN 08 2011

**In the Matter of:**

**The Application for Certification for the  
CARLSBAD ENERGY CENTER  
PROJECT**

**Docket No. 07-AFC-6**

**CARLSBAD ENERGY CENTER LLC'S RESPONSE TO  
THE CITY OF CARLSBAD AND CARLSBAD REDEVELOPMENT AGENCY'S  
MOTION TO TAKE OFFICIAL NOTICE**

**I. INTRODUCTION**

On June 1, 2011, more than fifteen months after the close of the evidentiary hearing on the topic of "Alternatives," the City of Carlsbad and the Carlsbad Redevelopment Agency (collectively the "City") filed a Motion to Take Official Notice ("Motion"). Applicant, Carlsbad Energy Center LLC, responds herein to the City's Motion.

In the Motion, the City requests that the Committee take notice of San Diego Gas & Electric's ("SDG&E") written, direct testimony filed with the California Public Utilities Commission ("CPUC") on May 19, 2011 related to SDG&E's application to enter into certain power purchase agreements. The City claims that the SDG&E's "testimony" is "relevant to determinations to be made by [the] Commission" in the Carlsbad Energy Center Project ("CECP") Application for Certification ("AFC") proceeding and further claims that the Presiding Member's Proposed Decision ("PMPD") for the CECP erroneously rejected the "no project" alternative.

The City's Motion comes less than two weeks **after** additional limited evidence was presented to the Committee at the Committee Conference on the PMPD and Evidentiary Hearing ("Hearing") held May 19 and 20, 2011 in Carlsbad, California.<sup>1</sup> The City's Motion is untimely, comes more than fifteen months after the close of the evidentiary record related to the topic of "Alternatives," and need not be considered for purposes of issuing a Final Decision. For these reasons, the Committee should deny the City's Motion.

## II. ARGUMENT

Applicant does not deny that the Energy Commission regulations on power plant site certification provide that "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs." (20 Cal. Code Regs., § 1212(a).) Further, Applicant agrees that each party to a siting proceeding has the right to submit testimony and other evidence, subject to the exercise of the lawful discretion of the presiding committee member. (20 Cal. Code Regs., § 1712(b).) Moreover, Applicant recognizes that the Committee may take official notice of "any generally accepted matter within the commission's field of competence, and of any fact which may be judicially noticed by the courts of this state." (20 Cal. Code Regs., § 1213.) However, at this late stage of the CECP siting process, and mere days before a decision is scheduled to be reached by the full Commission, the Committee need entertain only the most **critical** evidence; that is, evidence the Committee requested of the parties pursuant to its May 9, 2011 Notice and that which was called for in the PMPD.

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<sup>1</sup> The Committee's May 9, 2011 Notice of Committee Conference and Evidentiary Hearing ("Notice") Notice reopened the evidentiary record to allow evidence to be presented for very specific topics. These categories included and was **limited** to Worker Safety and Fire Protection, Seismic Safety, Air Quality (specifically related to the new federal standard for nitrogen dioxide) and Land Use.

Nevertheless, if the Committee determines the “testimony” submitted by the City should be considered, before taking official notice of the “testimony” the Committee must evaluate the substantive nature of the evidence and base its decision on whether the “evidence” is facts not known at the time of the Hearing, but that occurred prior to the Hearing or evidence that was improperly excluded during the Hearings in this proceeding. [CITE] If the Committee determines the “evidence” to be irrelevant to the CECP AFC proceeding, the Committee should deny the City’s Motion and allow the CECP proceeding to reach a final decision. For the reasons set forth below, the City’s Motion should be denied.

**A. The City Fails to Demonstrate Good Cause to Allow Late “Evidence”**

In the Motion, the City fails to demonstrate good cause to allow reopening of the CECP evidentiary record. With the closing of the record at the May 19 and May 20, 2011 Hearing, Applicant is confident that all relevant testimony, documents, and environmental review analyses have been presented to the Committee.

An exception to the rule limiting evidence to the record before the Commission exists when there is “relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing.” (*Western States Petroleum Ass’n. v. Superior Court* (1995) 9 Cal. 4th 559, 578.) Here, the City requests the Committee to consider “evidence” that did not exist prior to the any of the Hearings held in this proceeding. Specifically, the item the City requests the Committee to consider is testimony submitted to the California Public Utilities Commission (“CPUC”) by SDG&E related to various power purchase agreements, dated May 19, 2011. (City’s Motion at p. 2 and related attachment.)

The parties have had ample time and were provided ample opportunity to provide evidence and testimony, as well as legal briefs, on all topics required to be addressed pursuant to the Warren-Alquist Act, the Committee’s post-hearing briefing order, and the Committee’s

recent Notice. The City claims that the SDG&E testimony goes toward the discussion of the No Project Alternative for CECP, but the evidentiary record on Alternatives closed more than fifteen months ago. Moreover, the information presented by the City on the eve of a final decision by the full Commission lacks relevancy to this proceeding, and the City fails to explain its relevance in their Motion. For these reasons, the City fails to demonstrate any good cause why the CECP record must be reopened for purported “evidence” that is not discernibly relevant from that which has already been presented to the Committee.

**B. Closing of Record Allows for Finality of Proceeding**

The City’s continued requests to supplement the record with new information or reports is precisely why agencies close evidentiary records and only reopen the same upon showing of good cause. “The point of closing the record to receipt of additional evidence is presumably to bring order to the decision making process, enabling permit issuers to manage dockets efficiently and to bring finality to permit proceedings.” (*Appeal of Columbia Gulf Transmission Company* (July 3, 1990), United States Environmental Protection Agency, PSD Appeal No. 88-11, at pp. 4-5 (“*Appeal of Columbia Gulf*”).) The City’s instant Motion seeks to introduce new evidence into the record that, had a final decision been published months ago, would still have no bearing on the proceeding. Such information cannot be considered as part of the CECP evidentiary record because proceedings before the CPUC occur daily. If the Commission were to consider new information brought before the CPUC, or any other agency for that matter, no developer would receive the applicable permits to begin development of any project because the evidentiary record would never close.

Moreover, if the Commission allows a party or intervenor to reopen the evidentiary record each time an agency issues a report that discusses a topic related to a particular project or each time testimony is presented to an agency in the State of California, the Commission will



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APPLICATION FOR CERTIFICATION  
FOR THE CARLSBAD ENERGY  
CENTER PROJECT

Docket No. 07-AFC-6  
PROOF OF SERVICE  
(Revised 5/18/2011)

Carlsbad Energy Center LLC  
Applicant's Response to The City of Carlsbad and Carlsbad Redevelopment  
Agency's Motion to Take Official Notice

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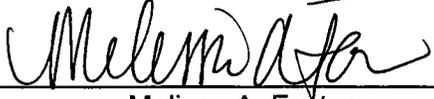
### **DECLARATION OF SERVICE**

I, Melissa A. Foster, declare that on June 8, 2011, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

### **AND/OR**

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

  
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Melissa A. Foster