

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

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In the Matter of:

The Application for Certification for the
CARLSBAD ENERGY CENTER
PROJECT

Docket No. 07-AFC-6

**CARLSBAD ENERGY CENTER LLC'S OPPOSITION TO
CENTER FOR BIOLOGICAL DIVERSITY'S RESPONSE IN SUPPORT OF
CITY OF CARLSBAD'S MOTION TO TAKE OFFICIAL NOTICE AND
THE CENTER'S MOTION TO TAKE OFFICIAL NOTICE AND
REOPEN THE EVIDENTIARY RECORD**

June 9, 2011

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STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

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I. INTRODUCTION

On June 8, 2011, the very date this Committee set as the deadline for all parties to this proceeding to file comments on the Presiding Member's Proposed Decision ("PMPD") for the Carlsbad Energy Center Project ("CECP"), the Center for Biological Diversity ("CBD") filed its Response to the City of Carlsbad's Motion to Take Official Notice and its own Motion to Take Official Notice and Motion to Reopen the Evidentiary Record ("CBD's Motion"). Applicant, Carlsbad Energy Center LLC, provides this response to CBD's Motion, a motion that comes more than sixteen months after the close of the initial evidentiary hearing (February 2010) and weeks after the subsequent two-day evidentiary hearing on limited issues (May 19 and 20, 2011).

CBD's Motion not only supports the City of Carlsbad and Carlsbad Redevelopment Agency's June 1, 2011 motion requesting that the Committee take notice of San Diego Gas & Electric's ("SDG&E") written, direct testimony filed with the California Public Utilities Commission ("CPUC") related to SDG&E's application to enter into certain power purchase agreements, CBD's Motion further requests the Committee take official notice of eleven

additional materials and/or to reopen the evidentiary record to admit these materials. (CBD's Motion at pp. 2-3.) Further, CBD requests that the Committee re-open the evidentiary record to include an additional six news articles, five of which existed prior to the limited scope May 2011 Hearing.

CBD had every opportunity to present the instant motion and any additional evidence well prior to the date on which the parties to this proceeding were ordered to file *comments* on the PMPD. In fact, all but two of the seventeen documents that CBD identifies in its Motion could have been presented to the Committee and all parties prior to or during the Committee Conference on the PMPD and Evidentiary Hearing May 19 and 20, 2011 in Carlsbad, California ("Hearing") – at which the Committee admitted into the evidentiary record additional testimony and evidence related to this proceeding. In fact, some of the information could have been provided prior to the February 2010 evidentiary hearings. Instead, CBD chose to wait until week prior to a final decision to provide comments on the PMPD and additional information to support arguments in such comments, without allowing ample time for the parties to review and refute such information on the record. CBD's Motion is untimely, comes well **after** the close of the evidentiary record, and need not be considered for purposes of issuing a Final Decision.

Applicant does not find the substance of the materials submitted by CBD to be very relevant to the CECP proceeding. Applicant, however, is concerned that such a last minute effort by CBD could distract the Committee into delaying holding the decision adoption hearing on June 15, 2011. Last minute filings, which lack time for parties to respond prior to a final hearing, are inherently unfair. Applicant is opposing CBD's Motion in an effort to make very clear how important it is for Applicant, the Carlsbad community, and the State of California that the CECP PMPD be adopted at the June 15, 2011 Business Meeting. The CECP application for certification proceeding is already tremendously behind schedule, due to reasons beyond the control of the California Energy Commission. Any further delay threatens the viability of this important repowering project that will provide not only jobs and electricity to the region, but also will provide the single best opportunity for the near term retirement of the Encina Power Station.

CECP is needed and provides significant local and statewide benefits. For these reasons, as well as those articulated below, Applicant respectfully urges the Committee to deny CBD's last minute Motion and also respectfully urges the Committee to present the PMPD to the full Commission at the June 15, 2011 Business Meeting.

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.

Nevertheless, if the Committee determines the information submitted by CBD should be considered, before taking official notice of the information 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. (*Western States Petroleum Ass’n. v.*

Superior Court (1995) 9 Cal.4th 559, 578 (“WSPA”).) If the Committee determines the information to be irrelevant to the CECP AFC proceeding, the Committee should deny CBD’s Motion and allow the CECP proceeding to reach a final decision. For the reasons set forth below, CBD’s Motion should be denied.

A. CBD Fails to Demonstrate Good Cause to Allow Late “Evidence”

In the Motion, CBD 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.” (*WSPA*, 9 Cal.4th at 578.) Here, CBD requests the Committee to consider ten separate items that existed prior to the May 2011 Hearings and one item dated May 20, 2011- none of which were presented as testimony or evidence during the Hearings.

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. CBD maintains that the eleven documents it seeks official notice of are necessary for the Commission to consider in light of the PMPD and the additional six articles CBD seeks be incorporated into the record contain facts that “undermine the veracity of certain statements or findings in the PMPD.” (CBD’s Motion at p. 5.) However, the evidentiary record on all but a limited scope of issues closed over sixteen months ago. Moreover, the information presented by CBD on the eve of a final decision by the full Commission lacks relevancy to this proceeding.

For these reasons, CBD 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. The Untimely Filing of CBD’s Motion Does Not Allow the Parties a Reasonable Opportunity to Refute the Motion

As noted above, CBD filed the CBD Motion less than one week before the scheduled final decision of the CECP before the full Commission. CBD argues that the information contained in the City’s Motion to Take Official Notice and the exhibits provided by CBD on June 8, 2011 in conjunction with its own Motion, are appropriate for official notice because they are “within the field of competence of the Energy Commission.” However, CBD fails to acknowledge that such information is only appropriate for official notice if the parties to a given proceeding are “given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.” (20 Cal. Code. Regs. § 1213.)

Here, CBD filed its Motion on the eve of the final decision by the full Commission. The evidentiary record closed sixteen months ago and the limited re-opening of the record for the purposes of the items noticed for the May 19-20, 2011 Hearing, closed at the end of the May 20, 2011 Hearing. Waiting until the eve of the final decision by the full commission does not provide the parties with a “reasonably opportunity to refute” the information contained in CBD’s Motion, and therefore violates Section 1213. For this reason, official notice should not be taken of the eleven documents in CBD’s Motion.

C. Closing of Record Allows for Finality of Proceeding

CBD’s extremely late request to supplement the record with new information, reports, and articles 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*”.) CBD’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. And the parties would never have a chance to respond to the ongoing introduction of new information into a proceeding.

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 or each time a news article is published, the Commission will never be able to close the evidentiary record and will invite endless requests similar to CBD’s Motion through and potentially including the day the Commission issues a final decision. Closure of the evidentiary record is critical to reaching finality on CECP’s siting process.

For these reasons, the Committee must opine that the record remain closed.

II. CONCLUSION

CBD’s Motion is untimely and the information sought to be noticed is irrelevant to the CECP proceedings. Moreover, the Motion does not seek to admit any relevant information that has not already been briefed or presented to this Committee. The Committee should maintain the

finality of certainty of the evidentiary record in order to avoid endless motions and petitions seeking to admit irrelevant information. Accordingly, CBD's Motion should be DENIED.

Date: June 9, 2011

Stoel Rives LLP

// ORIGINAL SIGNED\\

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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 Opposition to CBD's Motion to Reopen the Evidentiary Record

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DECLARATION OF SERVICE

I, Kimberly J. Hellwig, declare that on June 9, 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.

// ORIGINAL SIGNED \\

Kimberly J. Hellwig