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DOCKET	
07-AFC-6	
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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)
) DOCKET NO: 07-AFC-6
)
) CENTER FOR BIOLOGICAL
CARLSBAD ENERGY CENTER PROJECT) DIVERSITY'S MOTION FOR
) CLARIFICATION RE: CONTINUANCE
) OF THE COMMISSION HEARING ON
) THE PMPD; MOTION TO SET AN
) APPROPRIATE DATE FOR THE
) COMMISSION'S FINAL HEARING ON
) THE PMPD; MOTION FOR
) RECONSIDERATION
)
)
_____)

INTRODUCTION

The Center for Biological Diversity (“Center”) hereby files the following motion to request clarification of the Commission Order on Motions of City of Carlsbad, Center for Biological Diversity, and Robert Simpson (“Order”). In particular, the Center requests clarification of the language supporting the denial of the Robert Simpson’ Motion for Rescission. It is unclear from the Order whether the fifteen-day extension for the hearing was pursuant to California Code of Regulations, title 20, section 1753, entitled the Revised Presiding Member's Proposed Decision. If it was pursuant to this section, the Committee improperly set the hearing on the Presiding Member’s Proposed Decision (“PMPD”) for the Carlsbad Energy Center Project, and PMPD Errata (“Errata”) for June 30, 2011. On the other hand, if the continuance was not issued pursuant to section 1753, the Commission erred by not applying section 1753. The result of either scenario is that the Commission failed to properly apply section 1753 and its procedural requirements. Consequently, the Commission should rectify its procedural error by setting a comment period of at least fifteen-days for the Revised PMPD (collectively the PMPD and Errata) and then setting a hearing date after the close of the comment period.

Additionally, the Center hereby moves the Commission to reconsider its denial of the Center’s Request for Official Notice and Motion to Reopen the Evidentiary Hearing to allow consideration of the relevant new evidence presented. (See Order at 1-2.)

PROCEDURAL HISTORY

On May 9, 2011 at 8:08 pm, the Commission emailed to the parties a document entitled “Notice of Availability of the Presiding Member’s Proposed Decision and Notice of Committee Conference and Evidentiary Hearing and Notice of Full Commission Hearing (“Notice”). On May 19 and 20, 2011, the Committee held an evidentiary hearing on a limited set of topics in

Carlsbad, California. (Notice at 3.) The written comment period on the PMPD closed on June 8, 2011.

On June 8, 2011, the Center filed two documents: 1) Comment on the PMPD and 2) the Center for Biological Diversity's Response in Support of City of Carlsbad's Motion to Take Official and the Center's Motion to Take Official Notice and Reopen the Administrative Record ("Center's June 8 Motion"). On the same day, Robert Simpson filed a Motion for Rescission of the May 9, 2011 PMPD, arguing that the issuance of the PMPD violated section 1716.5 of the Commission's rules. The Commission issued a thirty-seven page Errata to the PMPD by email on June 14, 2011 at 7:24 pm, less than fifteen hours before the full Commission hearing on the PMPD was scheduled to occur.

During the June 15 hearing, the Commission orally denied Mr. Simpson's motion. The Commission issued a written order on June 20, 2011 explaining this and other decisions.¹ (Order at 2.) The Commission denied Mr. Simpson's motion, holding that a "literal interpretation of the regulations would result in the Commission being prohibited from holding any evidentiary hearing after a PMPD is issued regardless of the availability of relevant new evidence." (*Id.*) The Commission did "agree that, if a subsequent evidentiary hearing results in a revised proposed decision on an application, additional notice may be required pursuant to Section 1753." (*Id.*) In the next sentence, the Commission "continue[d] the adoption hearing until June 30, 2011, to allow all parties and members of the public an opportunity to provide comments on the revisions contained in the Errata to the PMPD released on June 14, 2011." (*Id.*)

¹ The Order is back dated to June 15, 2011 (Order at 2) even though the Commission released and emailed the Order to the parties on June 20, 2011.

Additionally, the Commission denied the Center’s June 8 Motion, explaining that “with the exception of one document, all were available prior to the May reopened evidentiary hearings and no basis for the failure to offer them at that time has been provided.” (*Id.* at 1-2.)

ARGUMENT

I. The Commission Should Clarify Whether Its Decision Applies to Section 1753.

Although the Order references section 1753, the Order does not clearly state if it was predicated on section 1753. (Order at 2.) The Order states that compliance with section 1753 may be necessary “if a subsequent evidentiary hearing results in a revised proposed decision on an application.” However, the Order does not make an explicit finding that those circumstances are applicable to this case and it is unclear if the Commission invokes section 1753. Instead, the Order continues the hearing, allowing the parties and the public an opportunity to provide comments on the Errata, but the Order provides no end date for the comment period. The Commission should clarify its intent because section 1753 places certain procedural requirements on the Commission, as explained below.

II. The Full Commission Hearing on the PMPD and Errata Should Be Renoticed for a Date That Complies with Section 1753.

A. If the Order Is Premised on Section 1753, Holding a Hearing on June 30 Conflicts with the Plain Language of Section 1753.

If the Commission continued the hearing pursuant to section 1753, the June 30 hearing date conflicts with the plain language of section 1753 that requires a fifteen-day comment period when the Commission issues a revised proposed decision. (Cal. Code of Regs., tit.20 § 1753.) Section 1753 states in part: “[i]f a revised proposed decision is prepared, it shall be forwarded to the full commission and distributed to all parties, interested agencies, and to any person who

requests a copy for a minimum 15-day comment period before consideration by the full commission.” (*Id.*)

By setting the hearing on June 30, 2011, the Commission did not provide the requisite fifteen-day comment period. The Commission issued the Errata on June 14 at 7:24 pm, after business hours. Because the Errata was filed after business hours on June 14, the issuance date should be considered to be June 15, 2011. When calculating a filing period, section 1003 requires that the time period exclude the issuance date. (Cal. Code of Regs., tit. 20 § 1003.) Thus, the last day of the fifteen-day comment period would be July 1, 2011. A full Commission hearing could be held on July 5 or after.²

Even if the Commission begins counting from June 14, a hearing on June 30, 2011 would still be contrary to the rules, because in that case, the last day of the comment period would be June 30, 2011. (Cal. Code of Regs., tit. 20 § 1753.) The rule explicitly states that there shall be a fifteen-day comment period before the Commission hearing. (*Id.*) Having the hearing on the fifteenth day does not provide the requisite comment period. The decision would be made before the comment period was over. Moreover, if the parties or public want their comments to be considered by the Commission, one would assume that the comments would have to be submitted before the hearing, further reducing the comment period.

B. If the Order Is Not Premised on Section 1753, the Commission Erred by Not Applying It.

If the Commission did not apply section 1753, it should have. Section 1753 allows the Committee to issue a revised proposed decision, and the Committee did just that when it issued the thirty-seven page Errata, which revises the proposed decision in multiple ways. The Errata makes a new extraordinary benefit finding in part based on information developed at the

² The Center assumes that there would be no meeting on the July 4th holiday weekend.

evidentiary hearing held after the release of the PMPD. (Errata at 32.) The Errata also includes significant new Land Use and Worker Safety conditions. (*Id.* at 15-19, 29-35) The Errata explains that the Commission decided to reject the City of Carlsbad’s Fire Marshall’s recommendation and assume the role of the fire department. (*Id.* at 16.) There is also a new analysis of California’s Once Through Cooling policy. (*Id.* at 31.) Finally, the Errata adds new facts that were not in the record in the greenhouse gas section. (*Id.* at 3-5.) This is not an Errata that simply makes a small number of minor administrative changes.

Furthermore, the language of the Order supports a finding that section 1753 applies. The Order states that “if a subsequent evidentiary hearing results in a revised proposed decision on an application, additional notice may be required pursuant to Section 1753.” (Order at 2.) Here, the subsequent evidentiary hearing did result in a revised proposed decision. The Errata specifically states that Land Use conditions LAND-2 and LAND-3 contributed to the new extraordinary benefit finding made by the Commission. (Errata at 32.) Both conditions stemmed from the evidentiary hearings held in May. (*Id.* at 30.) Under the Commission’s own definition of what triggers section 1753, this should be sufficient; however, as noted above, there are many other changes to the PMPD as well.

If the Commission did not base its continuance on section 1753, the Center respectfully requests that it do so. As discussed *supra*, if section 1753 applies, the June 30 hearing conflicts with the plain language of section 1753.

III. Even if the Commission Denies the Motion for Clarification, the Center Still Moves the Commission to Renote the Hearing for an Appropriate Date.

Even if the Commission decides not to clarify its Order, the Center requests that the Commission find that section 1753 is applicable and that the June 30 hearing should be

rescheduled for a later date in order for members of the public and parties to have the requisite time for written comments. (See section II.A. *supra*.)

IV. The Center's Motion for Reconsideration Should Be Granted.

The Center also moves that the Commission reconsider its denial of the Center's June 8 Motion, include the relevant documents that were subject to that motion into the evidentiary record, and consider this information. The Order denying the Center's motion says that "with the exception of one document, all were available prior to the May reopened evidentiary hearings and no basis for the failure to offer them at that time had been provided." (Order at 1-2.) This is inconsistent with the limited scope of the May 19 and 20 evidentiary hearings. This Order ignores the fact that the May 2011 evidentiary hearings were reopened for a limited number of topics. These hearings did not encompass the subject matter of the information on which the Center requested official notice. (Compare Notice at 3 and Center's June 8 Motion.)

The Commission set the May 19, 2011 evidentiary hearing only ten days into the thirty-day comment period, not giving the parties enough time to fully respond to the PMPD and the factual issues that it raised. During the Committee's May 19, 2011 hearing on the PMPD, Mr. Rostov gave notice to the Committee that there were factual issues outside the scope of the evidentiary hearings that would be raised in the thirty-day comment period on the PMPD. (TR:188:16-20, 191:2-194:2 (May 19, 2011).) Moreover, the Center objected to the unnecessarily expedited schedule the Commission placed on the parties and supported the City's motion to move the Committee evidentiary hearing and the Commission adoption hearing. (See City of Carlsbad's Motion to Enlarge Response Time and/or Continue Final Full Commission Hearing Date to a Reasonable Time (May 11, 2011); see also Center's Response in Support of City of Carlsbad's Motion to Enlarge Response Time and/or Continue Final Full Commission

Hearing Date to Reasonable Time (May 13, 2011.) The denial of the Center's June 8 Motion based on the Center not raising the issues at the evidentiary hearing is inconsistent with the process established by the Committee. Thus, the Center respectfully requests that the Commission reconsider the denial of its motion.

CONCLUSION

For the foregoing reasons, the Center respectfully requests that the Commission grant this motion and clarify whether the Commission based the continuance of the hearing on section 1753. In addition, the Center requests that the Commission move the hearing on the Revised PMPD to a date that provides at least a full fifteen-day comment period, before holding an adoption hearing on the Revised PMPD. Finally, the Commission should reconsider its denial of the Center's June 8 Motion to allow consideration of the significant new evidence presented therein.

DATED: June 27, 2011



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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)**

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on June 27, 2011 I served and filed copies of the attached, CENTER FOR BIOLOGICAL DIVERSITY'S MOTION FOR CLARIFICATION RE: CONTINUANCE OF THE COMMISSION HEARING ON THE PMPD; MOTION TO SET AN APPROPRIATE DATE FOR THE COMMISSION'S FINAL HEARING ON THE PMPD; MOTION FOR RECONSIDERATION. The original of these documents, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
[\[http://www.energy.ca.gov/sitingcases/carlsbad/index.html\]](http://www.energy.ca.gov/sitingcases/carlsbad/index.html).

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

- X sent electronically to all email addresses on the Proof of Service list;
by personal delivery;
- X by depositing in the United States mail at Oakland, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

- X **sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);**

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

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


