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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

City of Carlsbad and Carlsbad Redevelopment Agency
Comments on the Presiding Members Proposed Decision

June 27, 2011

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CALIFORNIA ENERGY COMMISSION

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1 Summary of Arguments

At the Commission's Business Meeting of June 15, 2011, it became clear to the full Commission that there remained unanswered legal and technical questions associated with the Presiding Members Proposed Decision (PMPD) on the Carlsbad Energy Center Project (CECP). The lack of satisfactory answers to those questions demonstrated that the PMPD could not be adopted by the Commission and the CECP should not be licensed based on this record.
The following pages include responses to the key questions and concerns correctly raised by Commissioners Douglas and Pederman at the Business Meeting and comments on the 37-page Errata issued the night before the Commission Business Meeting.

2 Responses to Questions Raised at the Business Meeting

a **Coastal Dependence** – The issue of coastal dependence and appropriateness of siting this facility in the coastal zone has been a central issue in these proceedings. When asked by the Commission at the Business Meeting how this proposed plant is coastally dependent, the Hearing Officer, CEC staff, and applicant provided no clear and simple answer. As noted by the City[1], no matter how the CECP is described, it does not meet the clear

[1] A discussion of conformance with the coastal dependency definition of the California Coastal Act was presented in written and oral testimony by Ralph Faust, former General Counsel of the California Coastal Commission as well as in briefs and comments on the PMPD filed by the City of Carlsbad.

definition of coastal dependency set forth in Public Resource Code section 30101, which states:

> "Coastal-Dependant Development or Use" means any development or use which requires a site on or adjacent to, the sea to be able to function at all." (emphasis added)

The PMPD, in an effort to deem the proposed CECP consistent with Coastal Act LORS, attempts to assign a coastal-dependent label on the power plant. The PMPD's justification that the CECP's continued use of ocean water constitutes coastal dependency is tenuous at best. This justification is expressed on Land Use Page 7 of the PMPD:

> "In addition, because the City of Carlsbad is unable to supply reclaimed water (Exs.193; 200, p. 4.9-14) to the project for cooling and other industrial purposes, it is necessary that CECP use its proposed ocean-water purification system. Thus, the proposed project (CECP generating units 6 and 7) is an expansion of a coastal dependent use and a coastal-dependent use in its own right. (Ex. 200, pp. 4.5-10 – 4.5-13.)"

The PMPD's stated justification is tenuous because it is not necessary to use ocean water to cool the plant. Because it is not necessary to use ocean water and its water needs can be met at other places outside the coastal zone, the plant is not required to be located on the sea to be able to function at all and thus, is not coastal dependent.

In addition to being able to be located at other locations outside the coastal zone, other ways exist for supplying the project with water. As has been made clear during the course of this proceeding, up to and including the June 15, 2011 Business Meeting, other options for supplying the project with water exists. The record is clear that the City could make reclaimed water available to the Applicant if it would pay for the necessary recycled water system upgrades. It is a common practice in the City of Carlsbad and throughout the State of California for project proponents to pay the cost of expanding existing public facilities to serve their projects. The Applicant was not willing to make

this payment but instead asked the CEC to permit the project with the ability to use either ocean water or reclaimed water.

The Applicant deviated from the PMPD's reasons for granting coastal dependency at the Business Meeting by claiming that re-use of existing infrastructure also serves to define the project as coastally dependent. Neither the Applicant's choice to pursue the use of ocean water nor its desire to re-use existing infrastructure for cost mitigation purposes satisfies the unambiguous language of the Coastal Act. The Applicant's choices and its costs preference do not make the CECP a coastal dependent land use. More importantly, it is inconsistent with the goals of the Act including to "protect, maintain, and where feasible enhance and restore the overall quality of the Coastal zone environment" (Cal Pub Res Code 30001.5)

Since the proposed plant is not a coastal dependent use, the remedy available to the Applicant is either to wait until the City expands its reclaimed water plant and then simply pay for the reclaimed water it uses or to pay for the expansion of the reclaimed water plant at this time, subject to a reimbursement agreement that would repay it for the costs advanced from sales of reclaimed water to subsequent users.

While the City appreciates that the CEC has the ability to override the Coastal Act by making appropriate findings, it cannot ignore the law and its basic definitions. Application of the plain language of coastal dependency is all that is required in this case. As has been pointed out in previous court cases, the legal standard is quite clear: "we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statue what it says there." *Conn. Nat'l Bank vs Germain* (1992) 503 U.S. 249 at 254. In interpreting and applying the provisions of the Coastal Act, the Commission is required to give the highest priority to environmental considerations. (*Gualala Festivals Committee v. California Coastal Comm.* (2010) 183 Cal.App. 4th 60, 67.) Whether or not the CEC chooses to override the Coastal Act is up to it, however, based upon the evidence in the record, it clearly should not determine that an air cooled power plant is a coastal dependent land use.

b **California Fire Code** – As the City has pointed out on several occasions, the California Fire Code embodies the basic laws of the state related to fire protection. The California Fire Code sets forth the roles and responsibilities delegated to the various authorities and establishes fire protection requirements including fire access.

As defined in Chapter 2 of the 2010 California Fire Code, the Fire Code Official is:

> "The fire chief or other designated authority charged with the administration and enforcement of the code, or a duly authorized representative."

Section 1.11.2.1of the Fire Code enumerates the duties and powers of enforcement, which clearly includes those provided to the city with jurisdiction in the area affected. Section 1.11.2.1.1 of the Fire Code designates the Fire Chief as the person responsible for that enforcement.

While the California Fire Code establishes minimum access widths (Section 503.2.1), the code also gives the local fire chief authority to make exceptions to this access width:

> "The fire code official shall have the authority to require an increase in the minimum access widths where they are inadequate for fire or rescue operations." (Section 503.2.2)

For the proposed CECP, the Carlsbad Fire Chief exercised this authority by requiring a 50-foot access road around the project in the pit and a 25-foot access road around the rim. The Fire Chief based this determination considering the nature of the site, size and scale of the project, adjacent site constraints including critical highway and rail corridors, the ability to deploy firefighting equipment, and local resources[2]. The Chief's access

[2] A more complete discussion of the Carlsbad Fire requirements is contained in the City's Comments and Assignments of Errors, filed June 8, 2011

requirements are fully endorsed by the Escondido Fire Chief following his experiences with the recent Palomar power plant fire.

The PMPD, however, did not accept the Fire Chief's requirements but rather relied on the CEC staff's recommendation that did not provide any operational basis for rejecting the Chief's conditions. The result is that the PMPD proposes to eliminate or require narrower emergency access roads based solely on the premise that it would be difficult for the project as currently designed to comply with the Fire Chief's conditions. This argument places the economics of the proposed project over the safety of firefighting personnel and the public.

Instead of declaring a need to override the Fire Chief's conditions, the PMPD Errata attempts to dismiss the Chief's authority by proposing to step into the shoes of the Fire Chief:

> "Given the Energy Commission's exclusive jurisdiction over the permitting and regulation of thermal power plants such as the CECP, we believe the role of 'fire code official' falls to us as we must both set the development standards for the project and then enforce them." (PMPD Errata Page 16)

When asked by the Commission at the Business Meeting for the legal basis of the PMPD Errata's claim, the CEC Hearing Officer and Staff was unable to provide any clear legal authority authorizing such an action. The City believes that the Errata's assertion is not consistent with the applicable statutes and represents a dramatic departure from common Commission interpretation, including information contained in the initial PMPD (PMPD LORS Table Appendix A-40 states Fire Code is locally enforced).

Upon review, it is clear that the Fire Code does not provide this type of delegation of authority to the CEC and the proposed condition does not conform to existing law. The fire official is the person in charge of a legally organized fire department or fire

protection district in the State of California (Health & Safety Code section 13100 et seq. and 24 California Code of Regulations §202). The Commission is not a legally organized fire department, fire protection district or the fire marshal; it is not legally competent to assume this role and its related powers and duties.

If the CEC pursues the legally questionable action of assuming the authority given by statue to the local fire chief, the CEC would then impose upon itself a panoply of liability, administrative, financial, and operational issues. Based on the simple reading of the statue, the CEC would also be assuming responsibility for fire safety enforcement and emergency response.

On a broader perspective, for local fire chiefs throughout the State of California, such an action by the CEC would represent an invasion into their sworn duty to uphold the Fire Code for the health, safety and general welfare of the local citizens. For cities and counties all over the State of California, it represents an intrusion into the authority of local government that appears unprecedented and unwarranted.

As with provisions of the Coastal Act, the CEC may have the ability to override project requirements established by the Fire Chief if it makes the appropriate findings, but it cannot ignore the local fire authority or assume the role and responsibilities of the designated fire official.

c **City Redevelopment Agency** – As stated in comments on the PMPD, the LORS implemented by the Carlsbad Redevelopment Agency require a finding that the proposed power plant provides an "extraordinary public benefit." However, as explained on page 16 of the Redevelopment Agency's comments on the PMPD, the Agency could not find extraordinary public benefits when the proposed project was presented to it. The proposed conditions, (Land 2 and Land 3) are necessary but not sufficient to provide those extraordinary public benefits. These proposed benefits do not go much further than the requirements on the existing Encina Power Station set forth in existing City laws (City of Carlsbad Ordinance 9456 (1976) and 9279 (1971).

When asked by the Commission at the Business Meeting what other "extraordinary public benefits" the CECP provides to the local citizens of Carlsbad, the Applicant asserted that extraordinary public benefits already provided by the Poseidon desalination project fulfilled the requirements for the CECP and that no additional local benefits were required for the CECP. There is no legal precedent anywhere in the City's history that the "extraordinary public benefits" of an adjacent project could be used by a proposed power plant to satisfy this requirement. It is axiomatic that each project must rise and fall on its own merits in the City of Carlsbad.

Contrary to the intent of state redevelopment law, the CEC staff did not see any reason to restrict the benefits to the City of Carlsbad. But that is exactly where the test of extraordinary public benefit lies. In addition, the new conditions LAND-2 and LAND-3 in the PMPD should not be used by themselves to satisfy the "extraordinary public benefits" standard because, as the Errata points out, the conditions do not provide a concrete benefit based on the possibility that the Encina Power Station may continue to run in to the future and the benefit of demolishing the existing plant already exists to a degree in the conditions already placed on the Encina Power Station.

The Redevelopment Plan specifically prohibits certain uses unless the Carlsbad Housing and Redevelopment Commission approves a discretionary finding of extraordinary benefit. Section 601 of the Redevelopment Plan specifically provides:

> " ...with the exception that new development (which provides generation and transmission of electrical energy) may be permitted in the Project Area only after the following are satisfied, a) the Carlsbad Housing and Redevelopment Commission approves a finding that the land use serves and extraordinary public purpose..." (Exhibit 407).

The finding that the use services an extraordinary public purpose requires the Carlsbad Housing and Redevelopment (the governing body of the Redevelopment Agency) to

exercise its discretion and determine whether or not an extraordinary public purpose exists. It is not permit-like and this Commission cannot substitute its discretion for that of the Carlsbad Housing and Redevelopment Commission. The Warren-Alquist Act does not provide this Commission with the legal power to substitute its discretion for the discretion of the local legislative body. When there is conflict between local law and the proposed facility, as in this case, the Commission must either deny the project or proceed under the override procedures (Public Resources Code section 25523 and 25525).

So, the CEC can make the necessary findings to override the Redevelopment Agency, but it cannot place itself in the shoes of the agency and make findings for which it does not have the authority and expertise.

d **Coastal Commission** Report - When responding to questions at the Business Meeting about whether the Memorandum of Agreement ("MOA") between the Coastal Commission and the Energy Commission required Coastal Commission participation and a report, the Applicant stated that the MOA was just an agreement not a Commission regulation. This was a non-answer. In reality the MOA, signed by both Commissions is in full force and effect and has never been rescinded. It further states, in many places, that a Coastal Commission report will be required. For example:

> "Pursuant to requirements of Sections 25523(b) and 30413(d) (in the Public Resources Code), the Coastal Commission is responsible, during the AFC proceeding for <u>each</u> project, for reviewing thermal power plant projects proposed in the coastal zone and providing a report to the Energy Commission…."; and
>
> "Section 25523(b) and section 1752(d) of the Energy Commission's regulations (Cal. Code Regs., tit. 20, section 1752 subd. (d)) require the Energy Commission to then adopt the specific provisions in the Coastal Commission's report…"

The City recently considered how the Commission had previously treated the issue of Coastal Commission participation in CEC proceedings by looking at the three PMPD's prepared for the Morro Bay proceeding (00-AFC-12). The Commission determined that the decision set forth in the 3rd Revised Presiding Member's Proposed Decision should be considered a "precedent decision" with respect to Coastal Commission participation in the CEC's AFC proceedings (3rd PMPD, page Introduction 6). The Commission then directed its Siting Committee to resolve "the legal and procedural questions regarding the roles and responsibilities of the Coastal Commission in power plant proceedings" (3rd PMPD, page Introduction 7). The Siting Committee's investigation resulted in development of the MOA with the Coastal Commission and its eventual ratification by both bodies. Consistent with the MOA, the Coastal Commission should have prepared a report. Absent that report, the Commission should have used the coastal report prepared by the City of Carlsbad since it is the local agency responsible for implementing the Coastal Act and under the oversight of the Coastal Commission in these matters.

In this precedential decision, this Commission is bound by the statements of its previous decision which stated:

> "The Commission recognizes the Coastal Commissions important role in the siting of power plants in the Coastal Zone and intends to assure that the Coastal Commission's views are appropriately considered in this and future coastal siting cases." (AFC, 00-AFC-12, 3rd revised PMPD, page 7, June 15, 2004).

This Commission should not ignore its precedential decisions.

Such precedential decision and the doctrine of collateral estoppels operates to prohibit this Commission from making a contrary finding. (*Pacific Lumber Company v. State Water Resources Control Board*, 37 Cal. 4th 921, 941 (2006)). ("We have recognized that "collateral estoppel" may be applied to decisions made by administrative agencies").

e **The City's Moratorium** – The Carlsbad City Council adopted Urgency Ordinance CS-067 on October 20, 2009 (Exhibit 404) that prohibits the development or expansion of power plants within Carlsbad's entire Coastal Zone. When asked at the Business Meeting why the moratorium did not apply, CEC staff stated that it did not have a CEQA document. This is not correct. The moratorium did receive CEQA review and resulted in the preparation and filing of a Notice of Exemption.

The Moratorium Ordinance was adopted during this proceeding to prohibit the location, approval and development of power plants in the Coastal Zone under the City's police power as a chartered city pursuant to California Constitution Article 11, section 5 and the statutes of the State of California which permit the adoption of such ordinances while a land use proposal is being studied. (Government Code § 65858). The general purpose of this statute is to authorize the local government to prohibit land uses that may conflict with contemplated general plan amendments or other land use proposals being studied by the City Council. That is exactly what happened in this case and, since no vested rights are disturbed, the Ordinance is entitled to full dignity and respect within the City of Carlsbad (California Constitution Article 11, §§ 5 and 7).

The moratorium was written to apply to any power plants in the Coastal Zone in Carlsbad:

> "...or allow the establishment of any other thermal electric power generation facility in the coastal zone". (emphasis added) (Exhibit 432)

The PMPD and CEC Staff at the Business Meeting also incorrectly described the applicability of the ordinance. The PMPD stated that because the City declared that the ordinance was declared exempt under CEQA Guideline section 15262 as a "project involving only feasibility and planning studies for future actions" by the City, it was only internally directed and had a non-substantive effect.

In response to the comment in the Errata that the City's witness testified that this action "was not intended to apply to anybody other than the city and city actions" (Id., at p.

240), the City has no authority over the CEC and hence cannot make a legislative ruling that applies to the CEC. It can, however, express its concerns and state what actions it would take or prohibit if it were in the position of permitting the proposed project. This is the case with any local LORS. And as is the case with any local LORS, the CEC must consider whether the project is in conformance and if not, the project can only be approved if the appropriate override findings are made.

f **Agua Hedionda Land Use Plan** – As recognized in the PMPD, the proposed project is subject to the Agua Hedionda Land Use Plan (AHLUP). At the Business Meeting, the Commission asked if there was a height limit of 35 feet in the AHLUP and, if so, did it apply to the project. Rather than directly answering the question, the CEC Staff replied that there was a conflict in the interpretation and that staff believed the Specific Plan allowed structures taller than 35 feet.

The facts are that the Agua Hedionda Land Use Plan, which serves as the City's local coastal program for that area and is different than the Specific Plan, does include a 35-foot height limit:

> "Height shall be limited to a maximum of 35 feet" (Section 1.9, Page 17 of the AHLUP).

The AHLUP was adopted in 1982 and amended in 2000, 2003, and 2006. Thus, the CECP clearly does not conform to the LORS set forth in the local coastal plan as defined by the AHLUP. This non-conformance would either need to be corrected by reducing the height of the CECP or overridden by the CEC if it made the necessary findings.

At the Commission's business meeting, as part of staff's response on the 35-foot height limit, staff brought forward its belief that it did not apply since there was a conflict in interpretation and that it had been clouded by the City's aspirations. However, the fact is that there is a 35-foot height limit unless an amendment to the Agua Hedionda Land Use Plan has been approved. This has not been done, and the Commission cannot amend that

plan; only the City Council and the California Coastal Commission can do that. In any event, "aspirations" cannot change the law. What the aspirations were when the law was passed do not matter; the motives of a legislative body or its members are irrelevant to the actual law itself. (*City of Fairfield v. Superior Court*, (1975) 14 Cal App. 3rd 768, *Oxnard Harbor District v. Local Agency Formation Commission*, (1993) 16 Cal App. 4th 259). In any event, the Redevelopment Plan was amended in 2005 (2 years before this proceeding commenced) and any aspirations developed during this proceeding are irrelevant.

When confronted with identical conflicts, this Commission instructed staff on the appropriate manner in which to treat local laws. It said:

> "Staff is not directed to re-interpret local LORS, or to make determinations that local LORS should be discounted. The legislature realized that there should be consistency in the interpretation of local LORS, and that allowing this Commission re-interprets these local LORS violates consistency of local interpretation (MEC Final Decision, page 325).

That City contends that is the appropriate standard that should be applied in this proceeding.

g **Alternatives and Public Necessity**– Concerns were raised at the Business Meeting over the scope of the alternatives analysis and necessity of the proposed project. The Commission should be concerned about the integrity of the Alternatives Analysis, especially in view SDG&E's filings before the PUC. The Commission's decision on taking official notice of the SDG&E May 19, 2011 filing with the CPUC does not prohibit the Commissioners from drawing conclusions from the SDG&E filing, made under oath. The testimony of Robert Anderson establishes that SDG&E only needs 450 MW of new gas-fired generation until 2020 (Testimony, page 13) which is satisfied by

the three project SDG&E selected and signed power purchase agreements with. As stated by SDG&E these three projects will:

- Meet additional electricity demands
- Allow for integration of renewables
- Provide quick-start dispatchable power, and
- Allow for the complete retirement of the Encina Power Station.

The three projects clearly confirm the fact that the CECP has no market at this time and that other alternatives to the plant or the location of the plant exist and should be explored.

The SDG&E projects also define the "no project" alternative discussed in the PMPD and make a compelling argument that the "no project" alternative is the preferred alternative. The Committee, on page 4 of the Errata, even relies on one the largest of these three projects to justify its greenhouse gas analysis. It is unclear how the PMPD can rely on one of the SDG&E projects to support its conclusion at one point and reject them in another.

The SDG&E filings also demonstrate that the CECP is unable to deliver on its purported benefits because, although it participated in a CPUC sanctioned procurement process, it was not able to secure a power purchase agreement with the local utility. It also challenges the CEC's ability to make a finding of Public Convenience and Necessity required to override the state and local LORS discussed above. Approval of this 540 megawatt project is expected to result in overbuilding fossil-fired generation in the region which is contrary to the CEC's expressed loading order and the State's desire to develop renewable resources.

3 Specific Comments on the PMPD Errata

a **Errata, Page 2, #6 Alternatives** - The Committee incorrectly affirms that the range of alternatives is sufficient even though it included only locations within the City of Carlsbad. The Committee relies on the staff FSA for this conclusion. This is not a reasonable range of alternatives required by CEQA for a project whose objectives are predominantly regional in nature (for example, "Meets the commercial qualifications for long-term power contract opportunities in Southern California" and "Meets the expanding need for new highly efficient, reliable electrical generating resources located in the load center of the San Diego region.") Because the CECP is a regionally significant project, CEQA expressly requires the analysis of alternatives to consider the regional context. (14 Cal. Code Reg. § 15126.6(f)(1).)

Further, in the event that the Commission recognizes that an override of one or more project related LORS is the appropriate course, the Commission must then determine that "all other alternatives are infeasible". This requirement cannot be satisfied by looking only at alternative sites within a single city. (*See Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1178 [it is the duty of the lead agency, not project objectors, to identify feasible alternative sites].)

b **Errata, Page 4, #13, Greenhouse Gas Table 3** - The Committee revised this table to reflect the change of status for two projects and the inclusion of an additional project – the 300 MW Pio Pico project. This is one of the projects that is proposed in the recent SDG&E filing for contract approval by the CPUC and indicates that the Committee considers this project more than speculative. It is curious that the Committee did not include the Escondido Energy Project (45 MW) or the Quail Brush Power project (100 MW). Contrary to the statement in the Errata that SDG&E has proposed to enter into these contracts, the SDG&E application actually states that "<u>SDG&E executed PPAs with</u>" all three of these projects (SDG&E Application, page 1, emphasis added). The Commission should either include all three SDG&E projects or none of them.

The Commission should also note that the SDG&E application for PPA approvals is in compliance with the CPUC's long-term procurement plan. This CPUC-approved plan calls for 450 MW of new generation by 2015. SDG&E, to its credit, incorporated the CEC's electricity forecast, extended its procurement plan out to 2018, and takes into account the potential retirement of all Encina units. With this increased need for new generation, SDG&E signed PPAs for 450 MW for new generation. One approach would be to consider the new "generic" generation need of 450 MW and reflect this amount of generation in the GHG analysis.

c **Errata, Page 15, # 28, Worker Safety** - The Errata, for the first time in this case and maybe in the history of the CEC, asserts that the Commission, not the local Fire Chief, has the authority to set and enforce development standards. The Errata rejects the requirements of the Carlsbad Fire Department and asks the Commission to "step into the shoes" of the Carlsbad Fire officials. The Fire Code could not be more clear:

> "The fire code official shall have the authority to require an increase in the minimum access widths where they are inadequate for fire or rescue operations".

The local fire code official is Fire Chief Crawford. Per his testimony and further supported by the lessons learned from the Palomar fire and supported by the Escondido Fire Chief, Chief Crawford requires access roads that are 50 feet in width for the lower perimeter road and 25 feet in width for the upper rim road.

Rather than require compliance, or hold hearing to establish if there is the basis for an override, the Errata imposes on the Commission the responsibility for local fire planning and response. Specifically, the Errata states on page 16:

> "Given the Energy Commission's exclusive jurisdiction over the permitting and regulation of thermal power plants such as the CECP, we

believe the role of "fire code official" falls to us as we must both set the development standards for the project and then enforce them."

During the PMPD evidentiary hearing, the CEC Staff witness, Dr. Greenberg, testified that he wanted to see the reasoning behind the Fire Chief's determination. The three Carlsbad fire officials offered the following reasoning behind the Fire Chief's 50-foot and 25-foot requirements:

(a) Project Location. The CECP will be located in a bowl, with energized electrical equipment and flammable liquids and limited opportunity for equipment to make turns and effectively maneuver. (May 19, 2011 Tr. 177) The location in a bowl with significant amounts of fuel represents, according to Chief Heiser, "a recipe for significant disaster" (May 19, Tr. 125). In addition to the bowl, the proximity of highway I-5, the lagoon and the railroad make the location very challenging. (May 19, Tr. 126-127)

(b) Operational Requirements. A ladder truck is ten feet wide, but requires an operational width of twenty feet (Feb 4, 2010, Tr. 53-55). With a 28-foot road, vehicles cannot pass. Also, vehicles and fire fighting personnel cannot locate "close to the fire" – firefighters need "standoff". Basically the fire department's concerns are both proactive and reactive – they need the ability to deploy resources and recover them. (Feb 4, 2010, Tr. 55)

(c) Fire Personnel. The Fire Division Chief testified as to the city's firefighting personnel and their training (Prepared testimony, submitted January 7, 2010).

The CEC Staff arrived at their recommended roadway widths by looking at the design drawings to see if there was sufficient space for the state's minimum 20-foot requirements. They then widened the roadway widths to reflect this minimum dedicated "fire lane" requirement and included an additional 8 feet for non-emergency vehicles and equipment. While this approach may be acceptable where there are no special concerns

due to a site configuration, this approach clearly does not consider "local knowledge", which is in the domain of the Carlsbad Fire Chief.

The PMPD places the Commission in a dubious legal position and shows a lack of respect for the local fire chiefs and their knowledge and experience. It raises a question the Commission should also ask: "Why on earth do we want to put ourselves in the position of being responsible for the administration and enforcement of the local fire code relative to this power plant?"

d **Errata, Page 17, #9, Interstate 5 Widening and Fire Safety** - The Errata continues the myth that the possible future widening of Interstate 5 will not degrade fire protection in any way. This is contrary to the analysis of the CEC Staff in the FSA. In the FSA, the CEC Staff made the following statement related to the distance between the CECP and the widened Interstate 5: "...the CECP at the closest point would have 45 feet available for visual-blocking vegetation and a protective barrier + security fence if a <u>retaining wall is used.</u>" (FSA, Page 4.14-15, emphasis added) To emphasize, according to the CEC Staff's statements and verified by the City's analysis and repeated testimony, only if a vertical retaining wall is used will there be room for visual blocking vegetation and a protective barrier and security fence. The proposed project, however, incorporates a slope rather than a retaining wall and hence is not able to accommodate these requirements of the project. Neither of these configurations, of course, accommodates the Fire Chief's access requirements and visual screening and a protective barrier. The modification of the project from a sloped wall to a vertical retaining wall may make fire fighting and escape more difficult.

e **Errata, Page 32, e. City Urgency Ordinance** – As discussed above, the Errata appears to dismiss the City's moratorium because "it was adopted without with no underlying CEQA document". No CEQA document is required for an emergency ordinance. Also, the Errata wrongfully dismisses the emergency ordinance because it is "internally directed". The Errata ignores the following testimony: "So the prohibition would be on the expansion or location of thermal electric power generation facilities in the coastal

zone." (2-1-10, RT 239) As is the case with other LORS, we request the Commission to either require conformance or consider an override.

Errata, Page 32, 49.7 Agua Hedionda Land Use Plan - The Errata offers the following conclusion: "The CECP is consistent with the Agua Hedionda Land Use Plan, which contains provisions similar to those in the General Plan." At a minimum, this is inaccurate with respect to the height limitation. As clearly identified on Section 1.9, Page 17 of the AHLUP, "Height shall be limited to a maximum of 35 feet". The AHLUP was adopted in 1982 and amended in 2000, 2003, and 2006. The CECP clearly does not conform to the AHLUP and thus requires a Commission override.

f **Errata, Page 32, 8 Extraordinary Public Purpose -** The Errata concludes that with the adoption of new Conditions of Certification LAND-2 and LAND-3, the CECP is consistent with the South Carlsbad Coastal Redevelopment Plan as these conditions represent an extraordinary public purpose. Although the City is grateful that the Committee urged the creation of these conditions, it cannot serve to fulfill the extraordinary public purpose standard. As the Committee points out (at Errata, page 22) there is no guarantee that Encina units 4 and 5 will be shutdown. The OTC policy requires only a reduction in entrainment and impingement effects, and the 2017 date is subject to review based on the needs of the state.

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. Thus, there are no extraordinary public purposes brought about by these new conditions.

g **Errata, Page 37, 9, 10 and 11 Visual Resources -** The Errata continues the fiction that with the Caltrans I-5 widening project (a virtual certainty) there will be sufficient land for visual screening. To be accurate, the Errata should concede that there will be insufficient screening lands even if the Commission overrides the Carlsbad Fire Department requirements. (See comment on Worker Safety above.)

The FSA did not assume the Carlsbad Fire Chief requirements, but made the following statements in discussing the distance from the water treatment trailer to the I-5 ROW after conducting ground measurements:

> "At this location, the Caltrans I-5 8+4 with Barrier configuration will extend the Caltrans ROW west to 26' from the western edge of the existing upper ring road (8' from eastern edge. . .) (Revised FSA, Page 4.14-14, emphasis added)

Even without the Carlsbad Fire Chief requirements, and without the greater 10+4 Caltrans configuration, there is only eight feet between the eastern edge of the upper ring road and the Caltrans ROW.

In discussing the distance from the SCR skid of the proposed CECP to the Caltrans right-of-way, the CEC staff in their FSA noted:

> ". . .the 8+4 with Barrier configuration will extend the Caltrans ROW west to 18 feet from the western edge of the upper ring road" (Revised FSA, Page 4.14-14)

The FSA analysis demonstrates and the City's testimony further confirms that there is insufficient land available for the visual screening required for the project considering the Interstate 5 widening. This is based on the current configuration and does not incorporate the Fire Chief's required road widths or the greater 10+4 with barrier configuration. We request the Commission recognize this reality.

4 Conclusion

As it became clear at the Business Meeting, state and local laws had been ignored, reinterpreted or argued as irrelevant in this PMPD. The City and Redevelopment Agency believe this is an abuse of discretion and is not proceeding in a manner required by law. According to the Warren-

Alquist Act, the CEC must consider all applicable LORS, determine if the project conforms with them, and make the appropriate findings. If the project does not conform and the CEC wishes to approve a project regardless of that non-conformance, it may do so but only after consulting with the appropriate agency and then making the findings on alternatives and the project's public convenience and necessity. In this case, there have been no hearings on override and no findings to support an override. The PMPD discusses project benefits that are common to any power plant and the CEC staff testified that this project can be built at other locations in the region. Staff has also stated its belief that the CECP will not be built at all if it does not have a power purchase agreement. Those statements hardly support the findings required for an override.

The City and Redevelopment Agency's recommendation is that the PMPD should be rejected and the project should be denied. If the project is to continue, it should be remanded to the Committee with instructions to consider the local laws and, if warranted, engage in the override process which requires notice to the local government of what laws will be overridden, a consultation and meeting with the local government in an attempt to correct or eliminate the noncompliance, and most importantly a finding that the plant is required for the public convenience and necessity and that there are not more prudent and feasible means of achieving that public convenience and necessity.

The City of Carlsbad and the Housing and Redevelopment Commission of the City of Carlsbad (the governing body of the Redevelopment Agency) thank you for considering these comments.

Respectfully submitted:

Ronald R. Ball
City Attorney for City of Carlsbad, and
General Counsel for Carlsbad Redevelopment Agency

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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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, Robin Nuschy, declare that on June 27, 2011, I served and filed copies of the attached City of Carlsbad and Carlsbad Redevelopment Agency Comments on Presiding Members Proposed Decision, dated June 27, 2011. The original document 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]**.

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:

✓ sent electronically to all email addresses on the Proof of Service list;

_____ by personal delivery;

✓ by delivering on this date, for mailing with the United States 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 **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

✓ 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
Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury 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.

Robin Nuschy

*indicates change