

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

DOCKET

07-AFC-6

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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
POWER OF VISION'S REQUEST FOR DATA
AND REQUEST FOR TIME EXTENSION**

November 29, 2011

John A. McKinsey, Esq.
Melissa A. Foster, Esq.
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
Phone: (916) 447-0700
Facsimile: (916) 447-4781

Attorneys for CARLSBAD ENERGY CENTER LLC

STATE OF CALIFORNIA

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I. INTRODUCTION

On or about November 21, 2011, intervenor Power of Vision ("POV") filed a Request for Data, which asks the Committee for this proceeding to issue data requests to Applicant Carlsbad Energy Center LLC and, further, "requests an opportunity for discovery" as such relates to the Carlsbad Energy Center Project ("CECP"). POV's specific requests seek information relating to the Federal Prevention of Significant Deterioration Permit and conditions of certification LAND-2 and LAND-3. Both of these issues are topics of testimony the parties have submitted or will be submitting in preparation for the evidentiary hearing scheduled for December 12, 2011.

Applicant opposes POV's Request for Data for several reasons. First, the discovery phase for this proceeding was closed long ago; thus, POV's Request for Data is untimely. Second, even if the Request for Data was timely filed, POV failed to follow proper procedural process as dictated by the California Code of Regulations. Specifically, as a party to this proceeding, POV should have submitted its Request for Data directly to the Applicant. And, finally, Applicant believes any "data requests" can be addressed during examination of witnesses during the December 12, 2011 evidentiary hearing. For these reasons, and for those reasons set

forth in detail below, Applicant respectfully asks the Committee to deny POV's Request for Data.

In addition to POV's November 21st Request for Data, POV submitted a Request for Time Extension (*sic*) on November 23, 2011 claiming that it needed additional time to respond to Applicant's Supplemental Testimony, Exhibits, Witness List and Time Estimates for Examination of Witnesses ("Applicant's Testimony"). POV's Request for Time Extension is without merit and the Committee should deny its request and further order the parties to maintain the schedule as set forth in the Committee's November 9, 2011 Scheduling Order.

II. ARGUMENT

As described above, POV's Request for Data and Request for Time Extension each fail, among other things, to demonstrate good cause and, therefore, must be denied.

A. POV's Request for Data is Untimely, Fails to Demonstrate Good Cause and is Procedurally Improper

POV has participated as a party to this proceeding for over three years and is well aware that the proceeding is far beyond the discovery phase. Presumably, POV received the Committee's November 9th Scheduling Order, which directed the parties to file testimony on specific dates. Nowhere in that Order did the Committee identify an opportunity for any party to reopen discovery or issue data requests to the Applicant. Furthermore, any requests for information should be directed to the Applicant on cross-examination of Applicant's witnesses during the December 12, 2011 evidentiary hearing. Therefore, POV need not have responses to its requests prior to submitting its own written testimony.

1. POV's Request is Untimely and Fails to Demonstrate Good Cause

POV's Request comes far too late in the process to be deemed timely. The Request comes over three years after CECP's AFC was deemed complete; nearly six times longer than CEC's regulations allow for discovery. California Code of Regulations section 1716(e) states, in pertinent part:

“[a]ll requests for information shall be submitted no later than 180 days from the date an application is complete, unless the committee allows requests for information at a later time for good cause shown.”

(20 Cal. Code Regs. § 1716(e) (emphasis added).) Section 1716 affords the Committee discretion to allow late filed information requests only if good cause is shown.

Discovery for this proceeding was closed well over three years ago; a fact POV is keenly aware.¹ POV fails to state, let alone demonstrate, any good cause why the Committee should allow such late filed data requests. Instead, POV simply claims that “it is in the best interests of the Committee to provide an opportunity for...intervenors to have access to relevant information prior to submitting testimony.” (POV Request at p. 1.) This is hardly a showing of good cause.

In addition to its failure to provide good cause for its late Request for Data, POV fails to recognize that it will have ample opportunity to cross-examine Applicant’s witnesses during the December 12, 2011 hearing. POV can provide evidence in its rebuttal testimony (due on December 7, 2011) to contradict any claims or statements made by the Applicant regarding the topics identified in POV’s Request for Data. Moreover, because each of the topics for which POV requests data are topics for which the Committee requested testimony, POV has the right to cross-examine Applicant during the December 12 evidentiary hearing.

Because POV’s Request for Data is untimely and provides no good cause as to why the Committee should allow such late filed data requests, the Committee must deny POV’s Request for Data.

¹ In May 2009, POV issued a data request to Applicant. Applicant objected to the data request as it was untimely. POV responded by filing a Petition to Compel Responses. While the Committee ordered Applicant to respond partially to POV’s request, it was careful to balance both the nature of the request and the burden on Applicant to respond with the late timing of the request. A subsequent request by POV was denied by the Committee based on the both the late timing and relevance of POV’s additional request for information. (See Committee’s Rulings on POV’s Petition to Compel Data Responses and Petition to Modify Order Compelling Data Responses, dated September 15, 2009 and November 9, 2009, respectively.)

2. POV's Request for Data is Procedurally Improper

Once a petition to intervene is granted by an AFC proceeding's assigned committee, the petitioner becomes an intervenor in the AFC proceeding. (20 Cal. Code Regs. § 1712.) It then becomes the responsibility of the intervenor to "present witnesses, to submit testimony and other evidence, to cross-examine other witnesses...[and] to obtain information pursuant to Section 1716..." (20 Cal. Code Regs. 1712(b); *see also* Part II.A.1, *supra*.) Here, POV's Request for Data was not issued to the Applicant; rather, POV called for the Committee to issue the data requests. Not only is POV's Request for Data untimely, it is procedurally improper as parties to an AFC proceeding are responsible for issuing their own data requests – during the discovery phase.

B. POV's Request for Time Extension is Without Merit

POV claims it requires additional time to respond to Applicant's testimony filed on November 18, 2011.² In its Request for Time Extension, POV states that Applicant "...provided transcripts of expert witness testimony only for the Grid Reliability issue..." and claims, in order to have a proper opportunity to make written responses to Applicant's testimony, "...[intervenors] should be provided in advance of what this testimony will be." (POV's Request for Time Extension at p. 1.) Not only does POV's Request for Time Extension demonstrate a misunderstanding of Applicant's provided testimony, POV also fails to demonstrate good cause as to why it should be provided additional time to submit its opening testimony. As such, POV's request must be denied.

Applicant believes POV is unclear about Applicant's November 18th testimony. Specifically, Applicant's testimony consists only of a single core document and several exhibits. Except for the topic of "grid reliability," all of Applicant's testimony is set forth in the core

² It is important to highlight the fact that intervenors to a proceeding are not required to submit testimony in an AFC proceeding. The burden of proof lies solely with the Applicant to prove sufficient evidence to support the findings and conclusions required for the certification of CECP. (*See generally* 20 Cal. Code Regs. § 1748.)

document – no other testimony was presented within the exhibits.³ Thus, all parties should have no problem reviewing Applicant’s testimony in the time period provided in the Committee’s November 9th Order.

Moreover, POV’s testimony due on December 1, 2011 is its “responsive testimony” - in essence, testimony responsive to the Committee’s November 9, 2011 Scheduling Order (“November 9th Order”). POV is not required to provide rebuttal testimony until December 7, 2011, the deadline for all parties to provide rebuttal testimony. Nevertheless, even if POV or any other intervenor were to proclaim it did not have enough notice to draft testimony responsive to the Committee’s November 9th Order, it is important to note that all parties have known for months about the precise topics for which testimony would be submitted and the evidentiary hearing would be held. In fact, the Committee issued a previous scheduling order dated August 11, 2011 (the “August 11th Order”). The August 11th Order required the parties to submit testimony on topics that included: 1) greenhouse gas issues as such relate to a potential requirement for CECP to maintain a Federal PSD Permit; 2) evaluation of the cumulative and alternatives analysis related to San Diego Gas and Electric’s Power Purchase Agreements with three new power plant projects in the San Diego region; 3) issues associated with conditions of certification LAND-2 and LAND-3 and their environmental impacts; and 4) grid reliability issues raised by comments from the California Independent System Operator during the June 30, 2011 Energy Commission Business Meeting. The Committee’s November 9th Order also requires the parties to provide testimony on precisely these topics.

POV was given twenty-two days, as were all other intervenors, to submit its testimony responsive to the Committee’s November 9th Scheduling Order – not “five working days” as POV claims in its request. (*See* POV’s Request for Time Extension at p. 1.) Moreover, on June 30, 2011, the parties were apprised of the topics that would be opened for additional testimony

³ Applicant’s testimony relating to “grid reliability” is set forth in Exhibit B of its November 18th filing. The testimony reads in a question and answer format and is a total of four pages.

and evidentiary hearing. The November 9th Order, which revised the August 11th Order, offered no surprise as to the issues the parties were to submit testimony – the issues have been known for over four months.

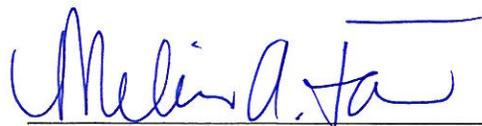
Finally, it is important to note that Staff's August 12th testimony consisted of nearly thirty pages of testimony and included only one exhibit, and Staff's November 18th testimony is only six and one-half pages and provides no exhibits. Similarly, Applicant's November 18th testimony is barely twenty-four pages and includes only four true exhibits (the remaining "exhibits" are simply declarations and professional qualifications). The parties should have no problem reviewing Applicant's November 18th testimony and filing rebuttal thereto by the December 7th deadline for all parties to file rebuttal testimony.

III. CONCLUSION

For all the foregoing reasons, Applicant respectfully requests that the Committee **deny** both of POV's Requests and order the parties to move forward with submitting testimony and preparing for the December 12, 2011 evidentiary hearing.

Date: November 29, 2011

Stoel Rives LLP



Melissa A. Foster
Attorneys for Applicant
CARLSBAD ENERGY CENTER LLC

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 10/24/2011)

CARLSBAD ENERGY CENTER LLC'S
Opposition to Power of Vision's Request for Data and
Request for Time Extension dated November 29, 2011

CALIFORNIA ENERGY COMMISSION

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

APPLICANT

Jennifer Hein
George Piantka, P.E.
NRG Energy, West
5790 Fleet Street, Suite 200
Carlsbad, CA 92008
jennifer.hein@nrgenergy.com
george.piantka@nrgenergy.com

APPLICANT'S CONSULTANTS

Robert Mason, Project Manager
CH2M Hill, Inc.
6 Hutton Centre Drive, Ste. 700
Santa Ana, CA 92707
Robert.Mason@ch2m.com

Megan Sebra
CH2M Hill, Inc.
2485 Natomas Park Drive, Ste. 600
Sacramento, CA 95833
Megan.Sebra@ch2m.com

COUNSEL FOR APPLICANT

John A. McKinsey
Stoel Rives LLP
500 Capitol Mall, Ste. 1600
Sacramento, CA 95814
jamckinsey@stoel.com

INTERESTED AGENCIES

California ISO
(e-mail preferred)
e-recipient@caiso.com

INTERVENORS

Terramar Association
Kerry Siekmann & Catherine Miller
5239 El Arbol
Carlsbad, CA 92008
***email service preferred**
siekmann1@att.net

City of Carlsbad
South Carlsbad Coastal Redevelopment Agency
Allan J. Thompson
Attorney for City
21 "C" Orinda Way #314
Orinda, CA 94563
***email service preferred**
allanori@comcast.net

City of Carlsbad
South Carlsbad Coastal Redevelopment Agency
Joseph Garuba, Municipals Project Manager
Ronald R. Ball, Esq., City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008
***email service preferred**
Joe.Garuba@carlsbadca.gov;
***email service preferred**
ron.ball@carlsbad.ca.gov

California Unions for Reliable Energy ("CURE")
Gloria D. Smith & Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
gsmith@adamsbroadwell.com
mdjoseph@adamsbroadwell.com

Center for Biological Diversity
c/o William B. Rostove
EARTHJUSTICE
426 17th St., 5th Floor
Oakland, CA 94612
***email service preferred**
wrostov@earthjustice.org

Power of Vision
Julie Baker and Arnold Roe, Ph.D.
4213 Sunnyhill Drive
Carlsbad, CA 92013
***email service preferred**
julbaker@pacbell.net
roe@ucla.edu

Rob Simpson
Environmental Consultant
27126 Grandview Avenue
Hayward, CA 94542
***email service preferred**
rob@redwoodrob.com

April Rose Sommer
Attorney for Rob Simpson
P.O. Box 6937
Moraga, CA 94570
***email service preferred**
aprilsommerlaw@yahoo.com

ENERGY COMMISSION-DECISIONMAKERS

JAMES D. BOYD
Vice Chair and Presiding Member
jboyd@energy.state.ca.us

Karen Douglas
Commissioner and Associate Member
kldougl@energy.state.ca.us

Galen Lemei
Advisor to Commissioner Douglas
e-mail service preferred
glemei@energy.state.ca.us

Tim Olson
Advisor to Vice Chair Boyd
tolson@energy.state.ca.us

Paul Kramer
Hearing Office
pkramer@energy.state.ca.us

ENERGY COMMISSION STAFF

Mike Monasmith
Siting Project Manager
mmonasmi@energy.state.ca.us

Dick Ratliff
Staff Counsel
dratliff@energy.state.ca.us

ENERGY COMMISSION PUBLIC ADVISOR

Jennifer Jennings
Public Adviser's Office
***email service preferred**
publicadviser@energy.state.ca.us

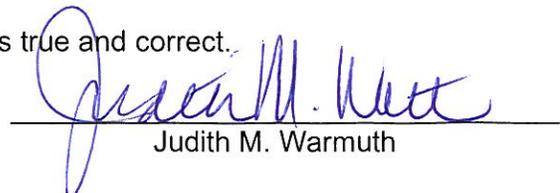
DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on November 29, 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.



Judith M. Warmuth