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Energy Resources Conservation
and Development Commission

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In the Matter of: Application for Certification for the Carlsbad Energy Center Project (CECP)	))))	Docket No. 07-AFC-6

City of Carlsbad and the City of Carlsbad as successor agency
to the former Carlsbad Redevelopment Agency
Initial Comments on the Revised Presiding Member's Proposed Decision

April 17, 2012

Ronald R. Ball
City Attorney for City of Carlsbad and
General Counsel for Carlsbad Redevelopment Agency
1200 Carlsbad Village Drive
Carlsbad, CA 92008
(760) 434-2891

Allan J Thompson
Special Counsel for City of Carlsbad and
Carlsbad Redevelopment Agency
21 "C" Orinda Way, #314
Orinda, CA 94563
(925) 258-9962

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Summary

On March 27, 2012, the Committee released its Revised Presiding Member's Proposed Decision (RPMPD). The City of Carlsbad appreciates that, in several places in the revised document, the Committee recognizes the desire of the City and its citizens to change the land use of the property occupied by and immediately adjacent to the Encina Power Station (EPS) from heavy industrial to coastal oriented recreations, commercial, and residential uses. The City also appreciates the Committee's commitment to "set in motion the forces" to encourage the removal and development of the EPS. Finally, the City also appreciates the Committee recognizing its efforts to find alternative sites within the city limits that could have been developed and served the electricity needs of the city and the region.

The City, however, is extremely disappointed and frustrated with the Committee's proposal to approve the proposed Carlsbad Energy Center Project (CECP) and allow the development and operation of a new power plant within the coastal zone and in a manner that the Carlsbad Fire Department believes is unsafe for plant workers, fire safety personnel, and the public. Consequently, our comments overall are critical of the RPMPD and the basis of the decision. We believe the Committee's decision violates the California Coastal Act, ignores provisions of the California Fire Code, makes override determinations based on faulty evidence and a limited and biased set of alternatives, and proposes visual mitigation that is unattainable and conflicts with the specific plans of the project. We also believe the project poses other issues and impacts that we have previously discussed at length.

The Committee states that its proposal to approve the CECP is "prudent" in response to future uncertainties in the region's electricity system. The Committee also freely admits that the decision is based on uncertainty and that it is uncertain when or whether the CECP will ever be built. Market forces will make this determination. The Committee's act of prudency, however, potentially condemns the City and the state to another power plant on its coastline for 50 years. Until the uncertainty is resolved and market forces act, the Committee's prudent "approve now" approach creates apprehension for the City and its citizens regarding its vision and places public projects such as the approved Coastal Rail trail in jeopardy. Perhaps even more importantly, by considering the typical attributes of a power plant as significant benefits and relying on something less than a clear, urgent, and compelling standard in making an override determination, the proposed CECP decision sets a very imprudent precedent by lowering the Commission's previous high standard for overriding state and local laws, ordinances, regulations, and standards (LORS). While we recognize the Commission has the authority to make such an override finding, the lowering of the override standard will no doubt raise the level of concern by cities and counties throughout California regarding how the Commission applies its discretion.

The Committee requested parties to file comments by April 17, 2012. The City has not completed its detailed comments on the RPMPD. They will be filed on or before the April 27, 2012 comment period. These comments identify our most critical concerns and conditions the City had previously proposed regarding the payment of usual and customary City fees.

Conditions LAND 2 & 3

The City of Carlsbad and the City of Carlsbad as successor agency to the Carlsbad Redevelopment Agency want to commend the Committee for its adoption of Land Use conditions of Certification designed to protect and enhance the Coastal environment. We especially want to thank the Committee for retaining LAND-2 and LAND-3 despite the Applicant's request to remove these conditions. We also appreciate the Committee's determination that, while they offer benefits, these two Conditions do not rise to the level of representing "extraordinary public benefits." The City offers two recommendations to make these conditions better and to help insure that the protections sought for the coast will come about.

Condition LAND-3 provides that, upon commissioning, the project owner is to seek authority from the California Public Utilities Commission and the California Independent System Operator to permanently shutdown EPS Units 1 through 5. This Condition also provides that demolition of the EPS and remediation of this coastal parcel of land is not required until there exists a "viable and funded redevelopment plan". While the project owner has addressed the possible deposit of funds in escrow to ensure project studies (CECP Brief, January 10, 2012, page 3), the City is more concerned with the ability of the Encina LLC to perform the demolition and remediation activities. The City recognizes that the responsibility for the demolition and remediation costs should not be borne solely by the CECP, however, an NRG corporate guarantee would ensure that the Encina station will be demolished and the site remediated when no longer needed. The basis of the City's concern is that the Encina plant is owned by a limited liability corporation (NRG Cabrillo Power II LLC) that could be left with an unused and valueless plant with a thriving and profitable CECP next door. The Applicant wants to bifurcate the revenue producing entity from the liability laden entity. Recall that Mr. Valentino testified that there is a need to "justify demolition" (September 13, 2011, Tr 38). As these conditions now stand, without a viable and funded redevelopment plan (which may not be possible with a $100 million demolition price tag), the existing Encina plant would blight the coastline forever. Despite Mr. Valentino's statement that the CECP and demolition and remediation "have nothing to do with what we are proposing on the east side of the railroad tracks" (September 13, Tr. 38), the use of limited liability corporations, without a corporate guarantee, leaves redevelopment of the Encina parcel in doubt. NRG, as the parent company, should not be able to enjoy the income from a part of their land while avoiding responsibility for the less-valuable part. An alternative approach to a corporate guarantee could be one similar to the South Bay experience where the project owner established a demolition fund. The City recognizes that it agreed to the arrangement whereby the costs of demolition and remediation would be borne by the redevelopment entity, however, it has later occurred to the City that this may result in an unfair and damaging result. Carlsbad will propose alternate LAND-3language reflecting its concerns in the final RPMPD comments.

California Coastal Act

The City of Carlsbad is very concerned and disappointed that the RPMPD misunderstands the California Coastal Act and hence reaches incorrect and unsupportable conclusions regarding the proposed CECP's conformity with the Act in general and the issue of coastal dependency in particular. Based on construction of the law and the facts in this case, the truth is that the proposed power plant is not a coastal-dependent facility nor is it an expansion of a coastal-dependent facility.

The Proposed Power Plant is Not Coastal-Dependent - A "coastal-dependent development or use" is specifically defined in Public Resources Code section 30101. That section provides:

> "Coastal-dependent 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 critical part of this definition is that the site on or adjacent to the sea is "required .... (for the development) to be able to function at all." As the record makes absolutely clear, the proposed plant cannot and does not meet this standard.

Unlike the existing EPS, the proposed power plant does not need to utilize once-through cooling and thus does not require a site on or adjacent to the sea to be able to function at all. As noted elsewhere, technological developments have made the environmentally destructive once-through cooling operation obsolete and the State Water Board is now in the process of closing all such plants in the Coastal Zone. The EPS has until December 31, 2017, to drastically reduce its dependence on once-through cooling or shut down. The proposed power plant is not required to utilize the site on or adjacent to the sea because it does not utilize once-through cooling, is not dependent on the EPS and nothing about its technology requires a site on or adjacent to the sea to function at all.

The fatal flaw of the RPMPD with respect to coastal impacts is that it assumes coastal dependency without ever meeting the test of PRC section 30101. Why? First, because the proposed power plant does not meet the legal test of section 30101, that section is simply ignored. Instead the RPMPD jumps directly to PRC section 30260. That section cannot be read in isolation and normal statutory interpretation requires the two sections to be read in harmony. The RPMPD does not do that. By its terms, section 30260 applies only to coastal-dependent industrial facilities. The RPMPD assumes that section 30260 is being applied to a coastal-dependent industrial facility. Each of the critical provisions of that section applies to coastal-dependent industrial development; but none of them makes industrial development coastally dependent. To paraphrase Justice Roberts in arguments before the United States Supreme Court in *National Federation of Independent Business v. Kathleen Sebelius, Secretary of Health and Human Services*, "Can the government create commerce in order to regulate it?" The same can be said for the RPMPD's assertion that the proposed power plant is coastal-dependent. "Can the Energy Commission create a coastal-dependent project in order to approve it?"

The RPMPD creates a coastal-dependent use, which does not meet the definition of the law, based in part upon the assumption that placing the CECP on the site of the existing EPS, which is coastal-dependent because it uses once-through cooling, makes the CECP coastal-dependent. It then extends the industrial use of this site for many years beyond the realistic life of the EPS. The RPMPD is inappropriately using the EPS as justification for the CECP's inconsistencies with the Coastal Act.

The consequences of using PRC §30260 to eliminate the essential definitional requirement of PRC §30101 entirely upends the priorities of development in the Coastal Zone making virtually any industrial development approvable under this override provisions regardless of that proposed development's inconsistencies with other Coastal Act policies. The Legislature neither intended this nor provided for it in the Coastal Act. Similarly, the Coastal Commission has never interpreted the Coastal Act to provide for the application of PRC section 30260 to industrial development that is not coastal-dependent. This interpretation cannot stand.

The RPMPD squirms mightily to avoid this fatal flaw. It recites at length various purported benefits of the proposed power plant. For example, at section 8.1-7, it recites that the location of the proposed power plant "facilitates" the ocean-water purification system, "allows" the proposed power plant to utilize the existing infrastructure of the EPS, and avoids the need to develop in areas of Carlsbad unaccustomed to or unsuited for this type of industrial development. Regardless of whether this last substitution of the wisdom of the City Council should be usurped, the plain fact is that none of these claims meet the standard of "required ... to be able to function at all."

The RPMPD also asserts that the proposed location of the proposed power plant at the site of the EPS, an existing coastal-dependent industrial facility, itself makes the proposed power plant coastal-dependent. For this, it relies upon the language of PRC section 30260 that "coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division" (emphasis added). But that language makes it plain that it applies to coastal-dependent industrial facilities; it does not make any co-located industrial facility coastal dependent. As noted above, to read this as does the RPMPD is to leave PRC section 30101 out of the Coastal Act altogether.

The RPMPD goes on to assert that placing the proposed power plant at this location is necessary for the use of the proposed ocean-water purification system. But this purported necessity is entirely contrived. As the record makes clear, the water needs of the proposed power plant can be met without being located adjacent to the sea. It can be met if the applicant chooses to pay for the costs of expanding the existing reclamation plant. Development has always been a privilege in this State and developers, even power plant developers, must pay the reasonable costs to exercise that privilege. In this case, the answer is simple; if the applicant wishes to build a power plant that requires reclaimed water, it should pay the reasonable costs for expansion of the plant that produces that water. The fact that it quarrels with the costs or the amount of expansion is immaterial; those decisions are not its to make. If it is required to expand the plant more than it wants to or more than it believes is necessary, if it can show that to the City Council, then it will be entitled to a reimbursement agreement. Arguments over money have never been a

predicate for special treatment under the law. Consistency with PRC section 30260 cannot be found upon this basis.

Finally, the RPMPD argues that the location of the proposed plant within the existing EPS site is consistent with the Coastal Act policy that "prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the Coastal Zone." But there is no issue here of a choice between the EPS site and another possible site in an undeveloped area of the coastal zone; that comparison is entirely false, particularly when applied to an industrial development that is not coastal dependent. To the extent that this assertion is derived from the specific provisions of PRC section 30260, it suffers from the same fatal analytical flaws as the other RPMPD arguments based upon that section: namely, that the clear language of section 30260 assumes that is being applied to industrial facilities that have been otherwise found to be coastal-dependent.

The Proposed Power Plant is Not Consistent With the Coastal Act - One does not need to look too far to see that the proposed power plant is not consistent with numerous policies contained in the Coastal Act. It conflicts with the policy of PRC section 30251 because it impacts the scenic and visual quality of the Carlsbad Coastal Zone and it conflicts with the policies of PRC sections 30230, 30231 and 30240 because of its perpetuation of impacts to the Agua Hedionda Lagoon. It conflicts with the policies of PRC sections 30220 et seq., which provide priority for particular types of development including visitor-serving recreational facilities over other types of development, including industrial development that is not coastal-dependent.

PRC section 30251 provides that the "scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance." The proposed power plant is a massive industrial facility that will occupy about 23 acres of land in the Coastal Zone and feature a smokestack that is about 140 feet high. This facility will be visible from all along the coast and ocean, is part of Carlsbad and will not "protect views to and along the ocean and scenic coastal areas." (PRC section 30251.) The RPMPD appears to assume that because the area is already visually degraded by the existing EPS, this further continuing visual insult will be of no significance. It does not even analyze section 30251 in its discussion of visual resources as will be discussed below.

The conclusion that it complies with PRC §30251 fails for a number of reasons. First, there is no reasonable basis in the record to assume that the existing EPS will remain in place for the life of the proposed power plant. To the contrary, the record is replete with evidence and discussions regarding the decommissioning and removal of the existing EPS. The RPMPD contains specific conditions that attempt to deal with foreseeable consequences of that day of removal which is set in motion and hastened by this recommendation. The fact that a precise date cannot yet be specified for demolition and removal does not provide a rational basis for an assumption that the EPS will remain in place throughout the life of the proposed power plant. Further, there is no basis in the Coastal Act to assume that the visual impacts of the EPS provide the baseline for valuation of visual impacts in the Coastal Zone. The verbal gymnastics of the RPMPD do not change the obvious: the proposed power plant is a massive industrial facility that significantly impacts the scenic and visual qualities of the Coastal Zone.

Second, the operation of the proposed power plant will prolong its impacts to the Agua Hedionda Lagoon that would otherwise cease with the cessation of operations at the EPS. The most significant impact to coastal resources, in the opinion of the Coastal Commission, of the operation of the existing EPS and other power generation facilities that utilize once-through cooling is to marine waters and marine resources from the suction water of from the Agua Hedionda Lagoon and other ocean sites. These impacts form the principal basis for the new State Water Resources Board OTC policy. It is quite likely that the EPS will not operate after 2017 and that the impacts on the lagoon from the operation of EPS will cease. In this context, any additional or continuing withdrawals of water caused by the operation of the proposed power plant will create new significant impacts upon marine resources of the lagoon, contrary to the provisions of PRC sections 30230, 30231 and 30240. As the record makes clear, these impacts are entirely avoidable.

The proposed power plant is certainly not visitor-serving which is a superior use over industrial use. (PRC section 30222.)

Coastal Act Scenic and Visual Impacts - As noted above, the proposed CECP is also inconsistent with the Coastal Act because of its impacts upon the scenic and visual resources of the Carlsbad coastal zone. The RPMPD finds that the screening to be provided by a berm and trees on the east side of the proposed CECP next to Interstate 5 provides proper mitigation of visual impacts under CEQA. The CEQA standard is irrelevant to Coastal Act consistency. This trivial mitigation does nothing to protect the "scenic and visual qualities" of the coastal zone nor to "protect views to and along the ocean and scenic coastal areas" in Carlsbad from being impacted by this massive industrial facility (PRC section 30251). The proposed CECP is also inconsistent with the Coastal Act because of its perpetuation of impacts to the marine resources of Agua Hedionda Lagoon, which would otherwise end with the cessation of operations at EPS, and because it ignores the planning and development priorities of the Coastal Act by favoring industrial development that is not coastal dependent over other development such as visitor-serving recreational facilities that are given priority in the Coastal Act. (See e.g., PRC section 30222).

The CEC committed to develop the coastal impacts analysis that would normally have been provided by the Coastal Commission pursuant to PRC section 30413, but has not done so. In Staff Status Report 4, June 30, 2009 at page 4 it is stated "Staff considered a Coastal Act consistency finding in the absence of specific Coastal Commission action." Such a study cannot be found in the record. Although the parties, including the City of Carlsbad, provided testimony regarding these impacts, there is no analysis of them in the RPMPD. For example Section VIII A., on Land Use, contains a subsection on "Consistency with California Coastal Act that does not even use the proper legal standard "The Visual Resources section addresses the CECP's visual impacts on surrounding land uses (including recreational resources), and how the proposed CECP would comply with this section of the Coastal Act", (at 8.1-8) referring to previously cited PRC section 30240 (b) which pertains to Environmentally Sensitive Habitat Area, not visual resources.

If the CEC had completed this coastal impacts analysis, it might have sorted out these various coastal resource impacts, but it didn't. Instead, the RPMPD cites Coastal Act provisions as applicable LORS, but then fails to analyze the evidence as it applies to those provisions. Nowhere is this clearer than in the Visual Resources section. That discussion quotes PRC section 30251 as applicable LORS (in Visual Resources Table 1, at 8.5-2), then ignores it until it is quoted (in part) again in the discussion of the cumulative impacts of the I-5 Widening Project (at 8.5-47). It is not mentioned again. The section then concludes, with respect to "Compliance with LORS": "Visual Resources Table 1 above identifies and summarizes the requirements of the applicable LORS. The evidence establishes that, as mitigated, the project will comply with LORS." There is neither analysis nor even discussion to "bridge the analytic gap" and justify this conclusion with respect to PRC section 30251.
In fact, the Visual Resources section makes no effort to analyze visual impacts except in relation to the limited criteria of CEQA. The section utilizes the four questions in the "Aesthetics" section of the 2006 CEQA Guidelines Appendix G Environmental Checklist. That Checklist asks:

1. Would the project have a substantial adverse effect on a scenic vista?
2. Would the project substantially damage scenic resources, including, but not limited to trees, rock outcroppings, and historic buildings within a state scenic highway?
3. Would the project substantially degrade the existing visual character or quality of the site and its surroundings?
4. Would the project create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?

Compare this to the scope of PRC section 30251, which provides in part:

> "The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas..."

The Coastal Commission considered the visual and other impacts of a proposed new power generation facility at the Encina site in 1990. In a report to the CEC the Coastal Commission evaluated the visual impacts of the proposed facility in the context of the continued operation of the existing Encina facility. The Commission noted the visual significance of the existing plant, which it found to have a significant adverse impact upon the visual environment of this area, which it also found to contain numerous vista points and scenic roadways. It noted that all development in the area of Agua Hedionda Lagoon must be consistent with a Scenic Preservation Overlay Zone, which seeks to protect the scenic qualities of the coastal area. Although the Commission noted that the new stack structures and building would represent "only an incremental increase in the level of impact upon the visual resources of the area, the impact will nevertheless be significant." The Commission concluded that given the size of the proposed structures and the visually prominent nature of the site, some "unmitigable" significant

impacts to the visual environment would occur that were not consistent with PRC section 30251, and thus that the visual impacts of the project were not consistent with the Coastal Act.

Compare this analysis to the Visual Resources section of the RPMPD, which repeatedly minimizes the impacts to visual resources from the proposed CECP. Most commonly this results from finding the new project visually subordinate to the existing EPS. What the RPMPD ignores in its analysis, with its preoccupation with the CEQA checklist's focus upon changes to the existing visual character of a site, is that an analysis based upon the Coastal Act does not simply look to the existing situation but rather to the situation over the projected life of the project. For example, in its 1990 report to the CEC on the proposed new power plant at Encina, the Coastal Commission stated: "The visual environment at the Encina site is somewhat degraded by the existing plant, but the new plant would intensify that impact *as well as extend the life of the current plant*". (p. 3, Executive Summary, emphasis added). Similarly, in its 2002 report to the CEC regarding the El Segundo Generating Station, the Coastal Commission stated: "...the proposal is expected to significantly extend the life of the current facility and will therefore increase the length of time the area will experience visual degradation due to the facility". (See reference in RF testimony to CEC, p. 9 for citation).

That precise circumstance applies to the proposed CECP in relation to the existing EPS facility. The EPS is not expected to operate beyond 2017, due both to its inefficiency and to the mandated phase-out of operation of generating facilities using once-through cooling. The significant visual impacts to the scenic coastal areas of Carlsbad and particularly of Agua Hedionda Lagoon will continue for many years after the EPS is removed if the proposed CECP is approved. It is ironic that the RPMPD allows for mitigation such as vegetative screening to be considered effective when considered over the long term, but does not consider the change to the existing EPS over the same long-term time frame. The long-term visual effects of the proposed CECP, when not artificially minimized by comparison to the EPS, are a significant impact under the standard of PRC section 30251 that cannot be mitigated. The artificial screening that the RPMPD proposes to the east of the CECP will partially hide but not disguise the massive facility behind. An elephant half-draped in cloth is still an elephant. More important, it will do nothing to protect views to and along the ocean and scenic coastal areas such as Agua Hedionda Lagoon (the other half of the elephant). Finally, the proposed CECP does nothing to "restore and enhance the visual quality in visually degraded areas". For all of these reasons, the proposed CECP is not consistent with the policies of PRC section 30251, one of the applicable LORS identified in the RPMPD.

The RPMPD Must Use the Best Evidence - What is the best evidence of coastal conformity in these proceedings? The RPMPD says that the 1990 Coastal Report is distinguishable. But the RPMPD does not offer any evidence, let alone best evidence, to support its conclusion that the proposed power plant is consistent with the Coastal Act. Indeed, the 1990 coastally-dependent power plant was determined by the Coastal Commission itself to be inconsistent with the Coastal Act. What evidence does the RPMPD cite to in order to overcome this? None. It only distinguishes that report saying that this is a different facility in a different location using different technology. However, this position undercuts arguments made elsewhere that this is merely an expansion of a coastal-dependent use. The RPMPD cannot have it both ways. More

than in 1990, the proposed CECP is a different facility using different technology. Although some impacts are clearly different, many of the impacts, including visual resources are identical.

If the 1990 report is not the best evidence, then the local coastal staff's report is. That is the report prepared and submitted by the City of Carlsbad staff acting as the Coastal Commission staff in this proceeding. The conclusion of that report is that the proposed power plant is inconsistent with the Coastal Act. The last resort for best evidence is the report contained in the FSA which has been thoroughly discredited.

The Fact that the Coastal Commission did not Prepare a Report is not a Delaying Tactic, it is a Requirement - As the City and the Redevelopment Agency have urged all along in these proceedings, the Coastal Commission's report is a necessary predicate to an override by the Energy Commission. The law requires the Commission to consider the report before it can override it. If it does not exist, how can it be overridden? As was suggested early on in these proceedings, the applicant should have been ordered to pay the reasonable and necessary expenses for the preparation of the required coastal report. It can and should be corrected now. To ignore it is a fatal omission which has infected and continues to infect the outcome of these proceedings.

In addition to these legal failures, the Commission has failed to follow its own MOA in reviewing this application. It has not been rescinded, must be adhered to until it is rescinded, and that requires mutual action by both commissions. It cannot be ignored in these proceedings and must be addressed in a revised RPMPD.

California Fire Code

The RPMPD requires that the CECP be constructed in accordance with Worker Safety figure 1 (page 6.4-18). This schematic illustrates the difficulty in constructing the CECP in a highly constrained area. There are three problems with the lay-out:

1. The road widths are too narrow to allow for safe emergency access. The road widths are to be 28 feet wide, but to meet the "red curb" requirement the access road needs to be at least 40 feet wide, which allows 12 feet for parking and deliveries. Carlsbad would note that if these issues are to be resolved by a "vertical wall", more information on such a wall is required. The figure does not allow for the requirements for "turnarounds", found in CFC 503.2.5

2. The cumulative effects of inadequate space for the construction and operation of a safe facility creates an unsafe facility for fire and worker personnel. Inadequate access compromises fire safety

3. The California Fire Code places interpretation and enforce ment of the fire code uinder the Fire Chief (CFC 1.11.2.1(2), clearly recognizing the relationship between those that interpret and enforce the code and those that respond to emergencies. The Fire Chief requires a 50 foot width in the "pit" and a road width of at least 25 feet for the upper rim

road. Under CFC 503.2.2. The Commission may have the authority to override these requirements, but it cannot, and should not, interpret the issues away.

4. If the Commission continues to declare that it, and not the local Fire Chief, is the local fire official, there are significant ramifications. The effect of the condition is to create a separate "jurisdictional island" for the CECP, with the issues of emergency response left to be determined. The Commission may want to consider how it will provide emergency services to the CECP.

Carlsbad will continue to consider its response to the RPMPD and will file additional comments on April 27, 2012.

Finding of Public Convenience and Necessity

The Committee relies on a list of "benefits" for determining that the proposed CECP meets the standard for public convenience and necessity. Most of these benefits are typical attributes for power plants currently built anywhere in California. The only benefit establishing the role this power plant would play in meeting critical regional and local electrical system needs is based on an analysis prepared by the CAISO that they have admitted is flawed in a proceeding before the California Public Utilities Commission (CPUC). The CAISO has modified its testimony in the CPUC proceeding and will be holding a workshop with the parties on the date these comments are filed to discuss how the analysis has been modified and to help the parities understand its implications. While the Commission has the discretion to make a determination regarding a project's ability to serve the public convenience and necessity, such a determination should not be based on evidence that has subsequently been modified and/or determined to have factual inaccuracies. The City of Carlsbad will address this issue in greater detail in its final comments.

Alternatives

Because it has unmitigated significant LORS impacts, the CECP cannot be approved unless the Commission finds there are no feasible alternatives which could reduce or avoid those impacts. The evidence in the record does not support a finding of infeasibility. To the contrary, there is substantial evidence in the record that the City is ready, willing and able to resolve any land use issues related to the alternative sites located within its jurisdiction. In addition to the alternative sites, the evidence also shows that the PPA projects, in combination with the reduced capacity alternative addressed in the PMPD, would avoid the unmitigated significant LORS impacts and would achieve most of the project objectives. The City has not yet completed its analysis of the PMPD's discussion of alternatives and will address other deficiencies in its final comments.

Visual Impacts and Mitigation

The RPMPD on page 8.5-53 concludes that the proposed CECP results in no significant adverse visual impacts and complies with all applicable LORS. The City still strongly disagrees with these conclusions and continues to assert the analysis performed by the Staff and relied on by the RPMPD is flawed. These arguments were included in the City's June 6, 2011 comments on the Presiding Members Proposed Decision. First, the CECP is proposed to be located in South Carlsbad Coastal Redevelopment Area. The purpose of this designation is to reduce and eliminate visual blight. As the City staff and the Redevelopment Director at the time testified, the CECP does not eliminate but rather adds to and extends existing visual blight. Neither the previous PMPD nor the RPMPD addresses this issue.

Second, the CECP is located within the Agua Hedionda Land Use Plan and subject to the Carlsbad Scenic Preservation Overlay Zone. As testified to earlier, the CECP does not preserve and enhance outstanding views or scenic qualities with an eye toward contributing to and enhancing community pride and prestige as required by this Zone. Again, the PMPD and the RPMPD have not addressed this conflict.

Finally, on numerous occasions during this proceeding, the City has also notified the Committee of the disconnect between the visual mitigation and the plans provided for the project. The RPMPD continues this disconnect by requiring the project owner as part of Condition VIS-2 to "provide landscaping that reduces the visibility of the power plant structures" in the form of "Trees and other vegetation consisting of informal groupings of tall, fast-growing evergreen shrubs and trees shall be strategically placed along the eastern, western, and northern facility boundaries..." The City still does not believe this mitigation requirement is compatible with the designs of the project shown on pages 2-8 and 6.4-18 and continues to be troubled that the Committee appears to again be requiring the applicant to plant trees along the sewer system right-of-way on the west side of the project site. The City requests that the Committee ask the Staff to indicate the location of visual mitigation on the figures found on pages 2-8 and 6.4-18.

Coastal Rail Trail

Condition LAND-1 (and Worker Safety-9) precludes a dedication of an easement for the Coastal Rail Trail east of the railroad tracks. Given the uncertainty that the CECP will ever be constructed, the City offers alternate language to require the CECP to establish a temporary Coastal Rail Trail on the east side of the railroad in the event the CECP fails to start construction. The City is not asking that this temporary trail be established until the trail segment to the north across the Agua Hedionda lagoon is completed. The Vista/Carlsbad Interceptor Sewer and Agua Hedionda Lift Station project is in final design and construction is anticipated to begin in late 2012 or early 2013. The bridge work is expected to be complete in mid to late 2014. If the CECP has not broken ground by the completion of the bridge, it makes sense to create a temporary trail (asphalt and fencing) with no amenities (e.g., no benches or water fountains) until the CECP breaks ground. The City's recommended revision to condition LAND-1 is as follows:

LAND-1 The Project owner shall dedicate a permanent easement for the Coastal Rail Trail within the boundaries of the overall Encina Power Station Precise Development Plan area in a location mutually agreed upon with the City of Carlsbad located west of the north/south AT&SF/North County Transit District Rail Corridor within 180 days from the start of Construction. If the start of construction of the CECP has not begun upon the completion of the bridge element containing the north-of-CECP Coastal Rail Trail segment, the project owner shall provide a temporary Coastal Rail Trail (asphalt and fencing), until the start of construction of the CECP. The temporary trail shall connect the segments of the Coastal Rail Trail north and south of the Encina parcel.

If the project owner and the City of Carlsbad cannot reach agreement on the location of the permanent easement (for example due to public safety and security reasons) the project owner shall provide funds to the City of Carlsbad for use in the development of the Coastal Rail Trail within the City of Carlsbad. The project owner shall provide funding to the City of Carlsbad for development of the permanent Coastal Rail Trail as approved by the Compliance Project Manager (CPM) within 180 days of the start of construction. The amount and payment of funds will be determined by an independent appraisal of property within the boundaries of the Encina Power Station that would have been provided for a Coastal Rail Trail easement. The project owner and City of Carlsbad shall mutually select an appraiser for approval by the CPM and pay all costs associated with the appraisal.

Conclusion

The proposed power plant should not be licensed at this time. If and when the proposed plant is revised to meet applicable laws and when the need for such a proposed plant is clear, it can be reconsidered.

Dated: 4/17/12

for Ronald R Ball

Ronald R. Ball
City Attorney for the City of Carlsbad and
General Counsel for Carlsbad Redevelopment Agency
1200 Carlsbad Village Drive
Carlsbad, CA 92008
(760) 434-2891

Allan J. Thompson
Special Counsel for City of Carlsbad and
Carlsbad Redevelopment Agency
21 "C" Orinda Way, #314
Orinda, CA 94563
(925) 258-9962

BEFORE 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 3/27/2012)

APPLICANT
Jennifer Hein
George Piantka, PE.
NRG Energy, Inc., West Region
5790 Fleet Street, Ste. 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, Suite 1600
Sacramento, CA 95814
jamckinsey@stoel.com

INTERESTED AGENCIES
California ISO
e-recipient@caiso.com

INTERVENORS
Terramar Association
Kerry Siekmann & Catherine Miller
5239 El Arbol
Carlsbad, CA 92008
siekmann1@att.net

City of Carlsbad
South Carlsbad Coastal
Redevelopment Agency
Allan J. Thompson
21 "C" Orinda Way #314
Orinda, CA 94563
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
Joe.Garuba@carlsbadca.gov
ron.ball@carlsbadca.gov

California Unions for Reliable Energy (CURE)
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. Rostov
EARTH JUSTICE
426 17th Street, 5th Floor
Oakland, CA 94612
wrostov@earthjustice.org

Power of Vision
Julie Baker & Arnold Roe, Ph.D.
4213 Sunnyhill Drive
Carlsbad, California 92013
julbaker@pacbell.net
roe@ucla.edu

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

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

ENERGY COMMISSION – DECISIONMAKERS

KAREN DOUGLAS
Commissioner and Associate Member
kldougla@energy.state.ca.us

Galen Lemei
Adviser to Commissioner Douglas
glemei@energy.state.ca.us

Tim Olson
Adviser to Commissioner Douglas
tolson@energy.state.ca.us

Paul Kramer
Hearing Officer
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 ADVISER
Jennifer Jennings
Public Adviser's Office
publicadviser@energy.state.ca.us

*indicates change

DECLARATION OF SERVICE

I, Flora Waite, declare that on April 17, 2012, I served and filed a copy of the attached City of Carlsbad and the City of Carlsbad as successor agency to the former Carlsbad Redevelopment Agency Initial Comments on the Revised Presiding Member's Proposed Decision. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/carlsbad/ index.html]**.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

For service to all other parties:

_X_ Served electronically to all e-mail addresses on the Proof of Service list;

_X_ Served by delivering on this date, either personally, or for mailing with the U.S. 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 marked "hard copy required."

AND

For filing with the Docket Unit at the Energy Commission:

_X_ by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method); ***OR***

___ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

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

OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

___ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
mlevy@energy.state.ca.us

I declare under penalty of perjury under the laws of the State of California 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.

Flora Waite

*indicates change