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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
Final Comments on the Revised Presiding Member's Proposed Decision

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Summary

The City of Carlsbad and the City of Carlsbad as successor agency to the former Carlsbad Redevelopment Agency (hereafter "Carlsbad") filed initial comments on the Committee Revised PMPD on April 17, 2012. Carlsbad herein does not repeat comments made on the 17th, but wishes to add and clarify on those comments. Carlsbad continues to believe that the RPMPD is fatally flawed.

Carlsbad has taken the position that this is the wrong power plant at the wrong location. The Committee recognizes that the proposed CECP violates numerous City laws, ordinances, regulations and standards as well as City policies. While the City recognizes the legal authority of the Commission to override City LORS, the desirability of doing so for a project that is "speculative" makes little sense.

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I. California Coastal Act Conformance

The RPMPD errs in not recognizing the Coastal Act nonconformance.

a. Requirements for approval of development under the Coastal Act

The Coastal Act (Public Resources Code (PRC) section 30000, et. seq.) was enacted by the Legislature to provide long-term protection, enhancement and restoration of the resources of the coastal zone for present and future generations. The objectives of the Coastal Act include protection of the State's natural and scenic resources, including the delicately balanced ecosystem of the coastal zone, maximizing public access and public recreational opportunities in the coastal zone and assuring that certain uses in the coastal zone are given priority in development approvals over other non-priority uses. These priority uses include coastal dependent industry and visitor-serving commercial recreational facilities.

Under the Coastal Act, the Coastal Commission is charged with making certain determinations; one of these is whether proposed development in the coastal zone is consistent with the policies of Chapter 3 (at PRC section 30200 et. seq.) of the Act. In its evaluation of proposed development in the coastal zone, the Commission must identify all potential impacts of the development on coastal resources and measure those potential impacts against the relevant standards of Chapter 3. When impacts are identified, the Coastal Commission, like all public agencies, must seek to avoid the impacts or to mitigate them to a level of insignificance. If significant inconsistencies remain, and the proposed development is not fully consistent with the Coastal Act policies, then the project cannot be approved, except under very limited circumstances.

One of these limited circumstances that has been considered and extensively discussed in the present proceeding is the "override" for coastal dependent industrial development contained in PRC section 30260. That section provides "where new or expanded coastal dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with (that section)...if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible". Thus for coastal dependent industrial facilities that are found to meet these three criteria, the Coastal Commission may override the lack of consistency with one or more other Chapter 3 policies and approve the project. Coastal dependent development or use is defined in PRC section 30101 to mean "any development of use which requires a site or, or adjacent to, the sea to be able to function at all".

b. The proposed CECP is inconsistent with the Coastal Act

The CEC staff, in Status Report #4 (January 30, 2009, page 3), committed to perform an analysis of the Coastal Act since the Coastal Commission declined to participate in the Energy Commission's permitting process reportedly because of budget and resource constraints. The CEC staff failed to do this and hence the only complete assessment of the CECP's conformance with the Coastal Act was prepared by the City. This report titled "California Coastal Act Conformance" and written testimony on the subject of Coastal Act conformity by Faust and Barberio was included with the City's testimony filed on January 4, 2010. The City expanded on its discussions regarding Coastal Act Conformity in oral testimony presented at the hearing on February 1, 2010 and in its brief filed on August 18, 2010. Nothing has changed the facts presented in that testimony and those documents.

As the City demonstrated in its report titled "California Coastal Act Conformance" and its testimony, the proposed CECP is not consistent with the Coastal Act in numerous respects. It conflicts with PRC section 30251 because it has significant impacts upon the scenic and visual resources of the Carlsbad coastal zone that cannot be mitigated; it conflicts with PRC sections 30221 and 30222 because it is not a priority Coastal Act use and it crowds out potential priority recreational uses of this upland area and of Agua Hedionda Lagoon; it conflicts with PRC sections 30230, 30231 and 30240 because as proposed it perpetuates the marine resource impacts to Agua Hedionda Lagoon beyond the expected life of the EPS facilities; and it conflicts with PRC sections 30210 and 30212 because it limits future access and recreational opportunities along both the shore and the lagoon.

First, the project is inconsistent with PRC section 30251, and the proposed mitigation does not eliminate that inconsistency. Section 30251 provides:

"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 overwhelming weight of the evidence shows that the proposed CECP is not consistent with that standard. The Redevelopment Agency determined and City witnesses Kane and Fountain testified that the area is blighted and that the proposed CECP would add to that blight rather than restore or enhance the quality of the area. The visual simulations from Key Observation Points 1, 2, 3, 4, 8, and 9 all show a new significant industrial presence that detracts from views to and along the ocean and coast. The RPMPD minimizes the significance of these view blockages by comparing them to the existing EPS facility and concluding that they would remain visually subordinate to that larger facility. It also recommends mitigation consisting of painting of the project structures to reduce color contrast and perimeter landscape screening to reduce the visual impacts over the long term. Neither the comment nor the proposed mitigation reduces the visual impacts to the point where they could be found consistent with PRC section 30251.

As was noted in the testimony of Ralph Faust, the Coastal Commission evaluates impacts not simply against the existing situation in one moment in time, as might be done under a CEQA evaluation, but rather over the life of the project. That testimony provided specific examples of situations in which the Coastal Commission looked at the impacts of a project, including visual degradation, over time. The RPMPD adopts this perspective to the extent that it considers the potential screening from vegetation growth over the long term. But it ignores this perspective when it reduces the visual significance of the proposed CECP by comparing it to the existing larger EPS facility.

There is no basis in the record to assume that the existing EPS will remain in place for the life of the proposed CEPC. To the contrary the record is replete with evidence and discussion regarding the decommissioning and removal of the existing EPS. The RPMPD contains specific condition language that attempts to deal with the foreseeable consequences of that removal. Absent the RPMPD's assumption, without evidence, that the EPS will remain in place for the life of the proposed CEPC, the visual impacts of the CEPC cannot be dismissed as visually subordinate to the EPS. In the words of the Coastal Commission in its comments to the Energy Commission with regard to the proposed El Segundo facility, it "increase(s) the length of time the area will experience visual degradation due to the facility". Similarly, the Coastal Commission, in its 1990 evaluation of a proposed new generating facility at this very location that was visually quite similar to the proposed CECP, concluded that "given the size of the proposed structures and the visually prominent nature of the site, the visual impacts of the development are not fully "mitigable" and "some unmitigable impacts to the visual environment are likely to occur". The comparison of the proposed CECP to the existing EPS is a false comparison. The RPMPD does not demonstrate that "views to and along the ocean and scenic coastal areas" have been protected; instead the RPMPD evidences that it does not consider and protect "the scenic and visual qualities" of this coastal area "as a resource of public importance".

Nor does the proposed mitigation, however beneficial, reduce the impact to less than significance. Painting the facility may reduce its relative color contrast but it remains a massive industrial facility that will loom over the coastal environment of Carlsbad throughout its life. Partial vegetative screening of the facility is not without merit, and should be required for any industrial facility that must be placed adjacent to the sea in order to function at all. But it eliminates neither the views nor the sense of presence of this industrial facility. As will be discussed further below, the Legislature did not create its development priorities as a whim. One of the fundamental reasons that industrial development that is not coastal dependent is not a priority use under the Coastal Act is that it visually detracts from the scenic resources of the coastal zone that the Legislature wanted to protect. Visitors do not go to the coast to view industrial facilities. The development priorities embedded in the Coastal Act are intended in part to protect the critical scenic and visual resources of the coast. The presence and the views of this plant cannot be reconciled with the policies of PRC section 30251. The proposed CECP is inconsistent with that policy.

Second, the Coastal Act, as noted above, prioritizes uses to be allowed in the coastal zone, with particular preferences required for some uses as compared to others. PRC section 30222 in particular applies to the present situation. That section provides: "The use of private lands suitable for visitor-serving recreational facilities designed to enhance public opportunities for

coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry”. The record in this proceeding and the extent of the discussion regarding the coastal dependency of the proposed CEPC are a demonstration of the importance of the section 30222 priorities.

A coastal dependent industrial facility is perhaps the highest development use in the coastal zone. A special provision of the law, section 30260, governs approval of such facilities. However, industrial facilities that are not coastal dependent, but instead are general industrial, are given a low priority. They cannot be approved, or even planned for by a local government unless, as is provided in PRC section 30221, “present and foreseeable future demand for public or commercial recreational activities that could be accommodated...is already adequately provided for in the area”.

Consequently, approval of the proposed CECP, unless it can be found to be a coastal dependent industrial facility, is inconsistent with the planning provisions of PRC sections 30221 and 30222. The existing EPS facility has been found to be coastal dependent because its once-through cooling technology required a site on, or adjacent to, the sea to be able to function at all. If the proposed CEPC cannot in a similar manner be found to be coastal dependent, then it is inconsistent with sections 30221 and 30222. A general industrial facility in a coastal location such as that of the proposed facility could not be approved without a full planning process by the City of Carlsbad, subject to the review of the Coastal Commission.

Third, the proposed CECP utilizes water drawn from Agua Hedionda Lagoon. Under the initial proposal the CECP would draw water from the intake stream of EPS Units 4 and 5. These EPS units draw water from Agua Hedionda Lagoon in precisely the manner that the State Water seeks to eliminate, because of the impacts to marine life due to the suction from the pumps pulling that water, and its tiny inhabitants with it out of the Lagoon and into the plant. EPS Units 4 and 5 use a technology that requires “once-through” cooling in order to reduce temperatures within the plant. The basis for their consistency with the Coastal Act was that because they were required to use once-through cooling, they needed a location on the sea in order to function at all. They are coastal dependent industrial facilities.

The CECP does not utilize such technology. New electricity generation facilities, such as the proposed CECP, no longer need to use once-through cooling or ocean water at all in order to properly function. They no longer need to be located at a site on, or adjacent to the sea in order to function at all. The applicant and CEC staff have argued that since the CECP will obtain its water from the intake stream of EPS Units 4 and 5, its water withdrawals will have no marine impacts upon the habitat of the Lagoon. The gap in this analysis is that it assumes that EPS Units 4 and 5 will operate for the same length of time as the proposed CECP. As was discussed above, and as the record makes completely clear, there is no evidentiary basis for that assumption.

The overwhelming weight of the evidence in the record demonstrates that the EPS will cease operation long before the CECP does. When that moment occurs, the CECP will need to have water for its operation, and unless it commits the money to secure the reclaimed water that it so far has refused to do, or in some other way obtains a source of water, it will continue to use water

withdrawn from the Lagoon, with all of the known environmental impacts. This is another significant inconsistency with the policies of the Coastal Act.

PRC sections 30230 and 30231 are definitive regarding this issue, and the interpretation of the Coastal Commission on the application of these policies to these water withdrawals has been, as the Energy Commission is fully aware, completely consistent on this issue. PRC section 30230 requires that marine resources “be maintained, enhanced, and where feasible, restored”. “Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms”. PRC section 30231 requires that the “biological productivity and the quality of coastal...estuaries...appropriate to maintain optimum populations of marine organisms...shall be maintained and, where feasible, restored...” As the Energy Commission is fully aware, of all of the impacts to Coastal Act policies consistency with which has been at issue regarding energy generation facilities in the coastal zone, impacts to these marine resource policies are the ones that have most concerned the Coastal Commission. Failure to obtain a source of water that does not rely upon withdrawals from Agua Hedionda Lagoon for the entire life of the project is inconsistent with the policies of PRC sections 30230 and 30231.

Fourth, the proposed CECP is inconsistent with the access policies of PRC sections 30210 and 30212. But for the existence of the EPS Units, and in the future the proposed CECP, members of the public would have access to the beach and to the lagoon in a manner that is not permitted now. It is understandable that the existence of energy generating facilities would necessarily limit public access in these areas. These facilities occupy necessary space and they need to be secure. So long as it is necessary to locate these facilities on the ocean or the lagoon, this is a sacrifice that the Legislature declared must be made. Where the facilities are coastal dependent, where their location on or adjacent to the sea is required in order for them to function at all, the policy conflicts with the access provisions can be and have been overridden. But if the facility is not required to be on or adjacent to the sea, then the access policies of the Coastal Act must be observed.

PRC section 30210 specifically implements Section 4 of Article X of the California Constitution. It provides that “maximum access...and recreational opportunities shall be provided for all the people, consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse”. PRC section 30212 requires that “public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects...” For a major visitor serving recreational facility or similar development, for example, the Coastal Commission as a matter of course would require public access to and along the coast and the lagoon. Understandably, a major electricity generating facility might not be required to provide such access, because of its special security needs and the hazards of its operation. This would not make it consistent with the public access policies of the Coastal Act, but it would allow this inconsistency to be overridden if the project was a coastal dependent industrial facility. Standing alone, however, the proposed CECP is inconsistent with the access policies of PRC sections 30210 and 30212.

c. The proposed CECP is not a coastal dependent industrial facility and cannot be approved under PRC section 30260

As has been discussed and as the testimony of Ralph Faust indicates, even if development is not fully consistent with one or more policies of the Coastal Act the Coastal Commission may still find it to be consistent with the Act and approve it if that proposed development meets the requirements of either of two Coastal Act override provisions. PRC sections 30200 and 30007.5, read together, allow the Commission to resolve conflicts between policies of the Coastal Act to approve development that, “on balance is the most protective of significant coastal resources”. Because such a conflict does not exist here, these override policies are not relevant to the Energy Commission’s decision. PRC section 30260, quoted above, allows the Commission to approve coastal dependent industrial facilities if certain requirements are met. The assumption of the RPMPD is that the various Coastal Act policy inconsistencies that exist can be overcome because the CEPC is a coastal dependent industrial facility. This assumption fails.

Section 30260 by its specific terms applies to coastal dependent industrial facilities. It does not make any particular industrial development coastal dependent. It simply applies its rules to those industrial developments that are coastal dependent. In order for a development to be coastal dependent, it must meet the requirement of PRC section 30101, which defines “coastal dependent development or use”. Section 30101 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”. This makes the determination of coastal dependency relatively simple. Is there something about the technology or operation of the proposed industrial facility that requires it to be located at a site on or adjacent to the sea to be able to function at all? As the record makes clear, there is nothing about the essential function of the proposed CEPC that requires a site on or adjacent to the sea.

The existing units of the EPS are coastal dependent because they utilize once-through cooling as an essential part of their operating technology. But technological developments have made that cooling system obsolete, and the State Water Board has initiated a process to close all generating plants in the coastal zone that use the environmentally destructive once through cooling technology. The proposed CECP does not use this technology, and nothing about its operational technology requires a site on or adjacent to the sea to be able to function at all. It does not meet the definition of PRC section 30101, and therefore is not a coastal dependent industrial use.

The fatal flaw of the proposed RPMPD is that it ignores the standard of section 30101 and instead simply assumes coastal dependency and goes directly to section 30260. But the provisions of PRC section 30260 do not create coastal dependency; they are only made applicable to industrial development that is already coastal dependent. The Energy Commission cannot create coastal dependency merely by stating that it is so. To eliminate this critical standard entirely upends the priorities of development in the coastal zone, making any industrial development approvable under this override provision, regardless of the 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; it would write PRC section 30101 out of the Coastal Act.

The RPMPD squirms mightily to avoid this fatal flaw. It lists the various purported benefits of the CECP. For example, at p. 8.1-7 it recites that the location at the EPS site “facilitates” the ocean-water purification system, “allows” the CECP to utilize the existing infrastructure of the EPS, and avoids the need to develop in areas of Carlsbad unaccustomed or unsuited to this type of industrial development. 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 CECP at the site of the EPS, an existing coastal dependent industrial facility makes the CECP coastal dependent. For this assertion 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. But as that language makes plain, 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 read PRC section 30101 out of the Coastal Act.

The RPMPD goes on to assert that placing the CECP in this location is necessary for its use of its proposed ocean-water purification system. But this purported necessity is entirely contrived. As the record makes clear, the water needs of the CECP can be met without that proposed system if the applicant chooses, or is required to pay for, the infrastructure costs of obtaining the water. Refusal to pay the legitimate costs of a proposed development is never the predicate for special treatment under the law. Consistency with PRC section 30260 cannot be found upon this basis.

Finally, the RPMPD argues that location of the proposed CECP 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”. To the extent that this assertion is derived from the specific provisions of PRC section 30260 that express that policy preference, it suffers from the same fatal analytical flaw as the other RPMPD arguments based upon that section: namely, that the clear language of section 30260 applies only to industrial facilities that have otherwise been found (under the definition contained in section 30101) to be coastal dependent. The policy preference of section 30260 is to prefer the on-site expansion of coastal dependent industrial facilities to the development of new coastal dependent industrial facilities in undeveloped areas of the coastal zone. The RPMPD ignores this critical language.

For all of these reasons, the RPMPD in its present form needs to be rejected by the full Commission. As discussed above, the proposed CECP is not fully consistent with the Coastal Act. It is inconsistent with PRC sections 30210, 30212, 30222, 30230, 30231 and 30251. Staff and the applicant have argued that the project may still be approved because it is a coastal dependent industrial facility, subject to the “override” provisions of PRC section 30260. The RPMPD has adopted this rationale. But it cannot be sustained. Section 30260 applies only to coastal dependent industrial facilities, and the proposed CECP does not meet the Coastal Act definition of such a facility. The proposed CECP is inconsistent with the Coastal Act.

II. Worker Safety Fire Code

The RPMPD errs in not recognizing the California Fire Code provision regarding the authority of the local fire chief and attempting to interpret the Fire Code violation away

- a. **The RPMPD ignores concerns that have been raised by City of Carlsbad Fire Department officials from the outset of these proceedings regarding the potential hazard posed by the project and despite the documentation of emergency events at other power plants.**

As recently as December 2010, a fire at Palomar Energy Center in Escondido burned unabated for 27 hours. As a result of this fire, the plant owner, San Diego Gas & Electric, has hired an independent fire agency to provide additional suppression at the plant, validating the City of Carlsbad Fire Department's concerns regarding the inherent hazard posed by natural-gas-fueled power plants.

The significance of this event and the arrangement by the plant owner for supplemental fire protection is not lost on the City of Carlsbad. SDG&E considered this fire a serious event and did not treat it as a highly unlikely future event. It should not be lost on the Committee, especially in light of the RPMPD's assertion that the CEC may act as the local fire official for the purpose of approving the project's safety design contrary to the strong recommendations and requirements of the professional fire fighters.

The RPMPD's recommendation may lead the City to put the CEC and the applicant on notice that the City cannot serve the CECP since the project does not conform to the Carlsbad Fire Chief's access requirements. In addition, the applicant has failed, from the outset of these proceedings, to meet with the Fire Chief to discuss the project safety plans and correct any deficiencies, leaving the Fire Department in the difficult position created by the CEC.

- b. **The FSA and PMPD dismissed serious concerns regarding the safety of the project as being statistically insignificant.**

Since the publication of the FSA and PMPD, several emergencies have occurred at power plants, including the Palomar Energy Center, which alone should give the Committee pause.

The CEC's safety expert, Dr. Alvin Greenberg, views fires at power plants as statistically insignificant. "The history of fires, emergency response for medical services, emergency response for hazardous materials spills. They are few and far between, except for the smaller ones. We do not have anything major. We do not have anything even medium." (DT, 11/4/10 [Greenberg], p. 133). The weekend after Dr. Greenberg so confidently expressed this view, an explosion at the Kleen Energy Plant in Middletown, Conn., killed six people and injured 30 others. The explosion was heard miles away. Before the year was out, a fire at the Palomar Energy Center in Escondido, about 19 miles from the proposed project, burned unabated for 27 hours.

The CEC Staff's response to these events was to study them and set a condition for prevention, on the false belief that no such fire will occur as a result of sound preventive measures.

This has been the source of the ongoing tension between the City of Carlsbad Fire Department and CEC regarding how to protect CECP workers, emergency personnel, and the surrounding community in the event of an emergency. The Fire Department has cited numerous instances where supposed foolproof preventive measures failed in the face of the unpredictable emergency. History is replete with disasters at purportedly invulnerable structures. In the City of Carlsbad Fire Department's experience, prevention minus an adequate response plan is a recipe for such a disaster.

The difference in these perspectives is that the CEC doesn't have to respond to an emergency when one occurs or fight a fire when one erupts. That task is left to local fire agencies and other first responders, as happened in Escondido on Dec. 22, 2010. As noted above, one result of that improbable event is that San Diego Gas & Electric, owner of the Palomar Energy Center, has signed a contract with a private firefighting company, Capstone Fire Management, to provide emergency response in the event of such a fire at Palomar Energy Center in the future. Escondido Fire Chief Mike Lowry reports that Capstone has two trailers equipped with foam on hand, one of which is housed in a former city fire station recently vacated by the Escondido Fire Department. The station is occupied by a Capstone fire brigade on an around-the-clock basis, 365 days a year. (Record of conversation with Escondido Fire Chief Mike Lowry, April 19, 2012, attached)

c. Based on the unique features of the CECP site and location, adjacent major transportation routes, and extensive experience, the Fire Chief established specific access requirements.

After careful consideration of the CECP site, evaluation of other power plant fires including the Kleen Energy and Palomar events, discussions with Chief Lowry on "lessons learned," the City of Carlsbad identified a number of concerns and made specific recommendations to the Committee regarding fire safety in this proceeding. In his capacity as the local Fire Code Official, the Fire Chief for the Carlsbad Fire Department also issued specific project access requirements for the CECP. These were for a 50-foot access road in the pit and a 25-foot access road around the rim. (City of Carlsbad Direct Testimony, 1/4/10, Crawford p. 3) These were not arbitrary or politically motivated requirements but were based on experience, logic, and clearly defined criteria. (Id., Weigand pp. 2-5) They were also fully endorsed by the Escondido Fire Chief based on his staff's experiences with the 2010 Palomar Energy Center fire. (PMPD Hearing, 5/19/11 [Crawford], pp. 123-129)

d. By exercising CFC Section 503.2.2, the Fire Chief's access requirements become a state and local LORS.

The California Fire Code (CFC) contemplates the importance of understanding unique site circumstances and having the appropriate expertise in reviewing and implementing project requirements related to emergency response. By placing Code interpretation and enforcement

with the Fire Chief (CFC Section 1.11.2.1.1(2)), the CFC clearly acknowledges the relationship between those who interpret and enforce the code in a specific location and those who must respond to emergencies. The City of Carlsbad Fire Chief's authority to impose emergency-access-related requirements flows from CFC Section 503.2.2:

“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.” (CFC Section 503.2.2)

The Fire Chief's requirements stand as conditions of the project and need to be included as part of any project approval in order to comply with the state and local LORS.

e. The RPMPD cannot ignore the access requirements as a LORS, it must address them.

Despite the City of Carlsbad Fire Department's experience and expertise, the input and advice of Chief Lowry from the Escondido Fire Department following the fire at the Palomar Energy Center, and the evidentiary record, the RPMPD blithely dismisses the City of Carlsbad Fire Chief's safety requirements as “not dispositive” (RPMPD p. 6.4-11). The RPMPD states that the CEC can assume the role of the local fire chief, claiming it is given such authority under the aegis of the Warren-Alquist Act. It then summarily dismisses the Carlsbad Fire Chief's safety recommendations despite reams of evidence supporting him, and mandates that a 28-foot road width is sufficient for the Carlsbad Fire Department to safely perform its emergency-response duties.

Counter to the wishes of the Committee, the California Fire Code Section 5.3.2.1 explicitly gives the local Fire Code Official the legal authority to designate road widths that differ from state fire code requirements. This same requirement is included in the adopted City of Carlsbad Fire Ordinance. Within the City of Carlsbad, the Carlsbad Fire Department is the local Fire Code Official. In the instance of the CECP, the local Fire Code Official established the access requirements based on the specifics of the project, site, and surroundings. These requirements are now State and local legal requirements.

Within the City of Carlsbad, the CEC is not the local Fire Code Official and access requirements established by the Carlsbad Fire Department for a specific project have nothing to do with the CEC's planning and regulatory functions. They have everything to do with local public, worker, and emergency personnel safety. This fact is reinforced in Appendix A of the RPMPD on page A-40, which states that the Fire Code is locally enforced.

PRC 25523 (d)(1) requires the CEC to make findings on applicable local, regional, state, and federal standards, ordinances, and laws. CECP, as proposed, fails to comply with this legal requirement. The Committee erred in neglecting the clear dictates of its own statute and regulations when it determined that it, and not the fire chief, had the legal responsibility to make local fire safety regulations.

The RPMPD incorporates conflicting assumptions and assertions to avoid an obvious conclusion. The RPMPD states that the CEC has the authority to perform the role of the FCO while citing as

its justification that the Warren Alquist Act gives it such authority for planning and regulatory purposes:

“Given the Energy Commission’s exclusive jurisdiction over the permitting and regulation of thermal power plants such as the CECP, the final determination of the appropriate access width is ours to make as we must both set the development standards for the project and then enforce them.” RPMPD, page 6.4-11

Again, this assumption of authority clearly conflicts with the 2010 CFC, which authorizes only the local Fire Department or, if not applicable, the State Fire Marshal as the acting FCO. Such assumption of authority also is inconsistent with the Warren-Alquist Act’s acknowledgement of the role that local agencies play in the CEC siting process.

The unusual approach adopted by the Committee violates the clear direction of the Warren Alquist Act, and makes PRC section 25525 useless. Section 25525 is clear that if there is noncompliance with one of the project LORS, the Commission must then apply the two-part test of findings that the project is needed for public convenience and necessity and that there are not more prudent means of achieving that public convenience and necessity. The Commission cannot escape this test by “standing in the shoes” of the local fire official and then making a contrary fire code determination. Similarly, the Commission does not have the legal authority to interpret local land use regulations. To assume that authority would make PRC 25525 superfluous as the Commission could “re-interpret” any law, ordinance, regulation, or standard that stands in the way of a project – a result clearly not contemplated by the Warren Alquist Act. If the Siting Committee does not agree with the conditions required by the local Fire Chief acting in his capacity as the Fire Code Officer, then the specific process for the CEC to follow is to override that local authority, as it has done elsewhere in this process. It cannot ignore the local fire authority or assume the role and responsibilities of the designated fire official.

- f. If the CEC assumes they have local Fire Code Official authority, they must also assume all responsibilities of the local fire code official.**

Even though the CEC is quick to assume the Fire Chief’s role for the purpose of approving a flawed safety plan, it steps back from its newly discovered powers and dictates that the Carlsbad Fire Department shall perform the duties of the local fire department: “The local fire department will continue to provide fire services to the project; ours is a planning and regulatory role.” (RPMPD, p. 6.4-3)

It is clear that the 2010 California Fire Code (CFC) confers planning and regulatory authority to the local Fire Code Officer (FCO). It is also clear that the Commission lacks the legal foundation for assuming the planning and regulatory responsibilities of the FCO. However, if the Commission continues the assertion that it can assume jurisdiction over the CECP as the FCO, then the City contends that the CEC must be prepared to assume the FCO’s full range of responsibilities.

The CEC cannot have it both ways. It either functions as the local fire department, or it does not. It cannot assume the role of the FCO at its convenience and wash its hands of the responsibility it has assumed in doing so. It cannot be half a fire chief.

To put it another way, if the CEC adopts a site plan that has obvious flawed fire access over the express objections and requirements of the City of Carlsbad Fire Chief, then it has in essence created a jurisdictional island specific to the project.

Such jurisdictional overlaps already exist within the City of Carlsbad, so the City is familiar with such operations and is happy to discuss such an arrangement with CEC. The best example is Palomar Airport, which is owned and operated by San Diego County in the City of Carlsbad. The County provides emergency response on the airport grounds and the City provides secondary support. The County in its wisdom has recognized the need for such an agreement, realizing that responsibility for the airport site does not end with regulatory concerns, but extends to the ongoing responsibility of providing emergency response and fire suppression.

If the CECP siting Committee wishes to assert itself as the FCO, and approve the CECP without the required conditions outlined by the Fire Chief per his authority as defined by CFC Section 503.2.2, or override the Fire Chief under the provisions in the Warren-Alquist Act, then the City must contemplate the possibility of notifying the Applicant and Committee that the Commission, not the City, will bear the responsibility of providing primary emergency response and fire protection. Following this scenario, the City may provide emergency support to the proposed facility on a case-by-case basis.

The RPMPD should be amended to clarify this shift in responsibility and highlight this change in the City of Carlsbad Fire Department's role as it applies to the CECP. The RPMPD should also spell out how it proposes to deliver emergency services and fire protection to CECP and clarify the different roles and responsibilities of the respective agencies.

The plan should also address emergency dispatch issues, which the City will discuss with the Committee, at the Committee's convenience. Finally, in accord with similar mutual-aid agreements the City has with other neighboring jurisdictions, the City is willing to discuss a mutual aid agreement that will take into account the large number of emergency-response apparatus, resources, and personnel that events at industrial facilities like CECP can demand in times of emergency. For reference, the City directs CEC to the Escondido Fire Department Incident Report on the Palomar Energy Center fire of December 22-23, 2010. (See City of Carlsbad Fire Department Additional Comments as a Result of a Power Plant Fire, January 12, 2011)

g. Figure 1 is inaccurate and inadequate for worker safety.

The RPMPD requires that the applicant construct the CECP according to Worker Safety Figure 1 (RPMPD, p. 6.4-18). After careful review of that conceptual schematic, the City has identified several design conflicts that will impede safe and timely delivery of emergency services to the project. These issues include:

- Depicted fire access widths are too narrow.
- The figure references non-existent fire apparatus.
- The plan lacks sufficient turnaround space.
- The plan excludes several project conditions of certification that will have a direct impact on the project layout.

Fire Access – A fundamental flaw in Figure 1 is that the dimensions call for roads with a total width of 28 feet, restricting the fire lane to a much narrower width. This issue was raised at the PMPD hearing (Tr. May 19, 2011, pp. 104-105, and p. 127). This creates a conflict because the same condition that requires the construction of the CECP per Figure 1 also requires access widths that are in excess of those included in Figure 1. The practical implication is that in order to meet the 28-foot red-curb requirement, the width of the perimeter access road must be at least 40 feet, allowing 12 feet for delivery vehicles to park. This additional 12-foot dimension is not reflected in Figure 1.

Additionally, Figure 1 designates interior access roads to be used by light-duty fire apparatus. This creates a twofold problem. First, the interior roads do not meet current fire-safety standards, because in some places the width appears to be less than 20 feet. This potential violation of the standard is covered over by calling the road a light-duty fire access road. However, this merely creates a fiction that emergency responders will have the ability to access these interior roads (light blue on Figure 1). This is an erroneous assumption that the RPMPD fails to correct. As has been stated numerous times during the proceedings, the Carlsbad Fire Department does not deploy any equipment designated “light-duty fire apparatus,” nor does it exist in any relevant context (Evidentiary Hearing Testimony [Weigand], 2/4/2010, pp. 61-62). Thus, the interior roads depicted are essentially useless to responding emergency vehicles, and in fact may create more of a trap than a valid path of ingress and egress.

Figure 1 also does not reflect the requirements required by CFC Section 503.2.5, which mandates turnarounds for dead-end roads longer than 150 feet. The plant’s interior roads (shaded in light blue) fall subject to this section. Several options exist for the design of such turnarounds (model examples are included in CFC D103.4), and the CFD is willing to discuss which option best suits the project.

A conflict also exists between Worker Safety Condition of Certification 7 and Visual Impact Condition of Certification 5. Figure 1 does not depict the barrier and berm required by Worker Safety Condition 7 (RPMPD, p. 6.4-16). In addition, Figure 1 does not depict the screen of trees called for by Visual Impact Condition 5, (RPMPD, p. 8.5-59). As the Committee may recall, these conditions were established after CEC staff identified that a potentially significant visual impact would be created by the CECP in conjunction with the I-5 widening project (Ex. 200, p. 4.12-1), which would, among other things, create a potential hazard of errant vehicles from I-5 veering into CECP property. To mitigate this hazard, staff recommended both conditions —

VIS-5 and WS-7. However, due to site constraints, the only way to incorporate both conditions is through the construction of a vertical retaining wall along the eastern boundary of the bowl. This was depicted in Staff's Prehearing Conference Statement of January 14, 2010, as Exhibit VIS-1, and described in testimony by William Kanemoto (RT, 2/04/10, pp. 56-57).

Because Figure 1 has not been altered to reflect the changed conditions, the result is an alarming level of uncertainty regarding the site plan and whether all the elements can be squeezed onto the constrained site. The new Conditions of Certification have complicated the already constrained nature of the project, and none of the changes is accounted for in the site plan.

h. Conclusion

While CEC has progressed during the proceedings to acknowledging potential hazards of massive natural-gas-fueled power plants, the RPMPD still falls short, in the City's opinion, of providing a sound worker safety plan. It continues to ignore the evidence provided by the City of Carlsbad Fire Department and fails to accept the Fire Chief's safety access requirements and contrives to stand in his shoes to approve a flawed safety plan for the project.

Should CEC continue down this road, the City is placed in the position of having to make a choice to cede fire suppression and emergency response to CEC by creating a jurisdictional island for the project and to treat any emergency response on a case-by-case basis until such time that the project conditions required by the Fire Chief acting under the authority granted to him by the California Fire Code have been implemented.

:

III. Obligation to Consult and Meet

The Committee errs in not meeting with the City of Carlsbad as required by law

a. The Commission has repeatedly brushed aside the obligation to "consult and meet" with the City of Carlsbad about the LORS noncompliance issues.

Public Resources Code Section 25523 (d)(1) states:

"If the commission finds that there is noncompliance with a state, local, or regional ordinance or regulation in the application, it shall consult and meet with the state, local, or regional governmental agency concerned to attempt to correct or eliminate the noncompliance. If the noncompliance cannot be corrected or eliminated, the commission shall inform the state, local, or regional governmental agency if it makes the findings required by Section 25525."

The plain meaning of the statute is that once the Commissioners, or their assigned Committee, make a determination of noncompliance, they must meet with the concerned agency. The term "Commission" used in 25523 refers to the governing body of the Energy Commission – the

Commissioners. The obligation to “consult and meet” cannot be handed off to the CEC staff since the staff are not representatives of the Commission but rather an independent party. The term “governmental agency” clearly means the entity with policy-making authority over the applicable ordinance or regulation in nonconformance. In the case of City of Carlsbad land use nonconformance, the consultation needs to take place between the assigned Committee and the Carlsbad City Council or their respective representatives. That consultation has never occurred.

Some have stated that such consultation constitutes an ex-parte communication since, in this case, the City of Carlsbad is an intervenor. Even if such a consultation were to take place in public, a true dialog intent on attempting to correct or eliminate the noncompliance as required by the statute would be more productive than the adversarial forum created by the Commission hearings with the associated quips about the City’s land use requirements.

b. Meeting would not be a futile act.

Some parties to this proceeding have stated that such a consultation between the Commission and the City of Carlsbad would be futile given the stated opposition of the City to the CECP. There is no “futility” exemption in the statute to the consultation requirement. Indeed the requirement is rather intended to try to resolve public policy differences established by different government agencies. In the case of the CECP, the City of Carlsbad has stated on many occasions that it is not opposed to a power plant being located in the city. It is rather opposed to a power plant located within the coastal zone, that contributes to blight, that represents a significant fire safety risk, and that has significant visual impacts. The City has been willing to work with the Commission on finding alternative sites and alternative designs. At no time during this process has the Commission truly attempted to discuss the concerns of the City and seek a solution that would meet the needs of the city, the basic objectives of the project, and the long-term needs of the public. There has rather been a “father knows best” or a take it or else attitude on the part of the Commission. To be generous, the rationale behind that approach may result from a perspective that the Commission must only react to the proposal submitted by the applicant. That logic, however, flies in the face of the requirements of the California Environmental Quality Act, particularly the alternatives evaluation, and the requirements of PRC 25523.

c. Meeting Precedents.

Such consultation processes have been used in other Commission proceedings. The City is aware of the Calico Solar Power Plant proceeding where the Committee, after intently listening to the perspectives of all the government agencies, intervenors, and applicant and determining the project would result in significant adverse impacts and LORS nonconformance, requested the applicant to redesign the project to avoid specific resources and reduce the potential impacts – essentially to produce a compromise project that would better meet the needs of all the parties and the long-term needs of the public, while meeting most of the project goals. The applicant made a significant modification and the Commission approved the project under its override authority. Had such a process been used in this proceeding, the process may well have produced

a smaller plant either that did not contribute to blight or was located in an electrically equivalent location that met most, if not all, local land use regulations.

IV. LORS Override

The Committee Erred in the Determination That Minor, Non-extraordinary Project Benefits Satisfy the LORS Override Criteria

a. LORS Nonconformance Override

Having correctly determined that the CECP will result in numerous LORS violations, the Commission failed its legal obligation to evaluate prudent and feasible project alternatives that would achieve the “Public Convenience and Necessity” findings.

The law requires the Committee to make findings that the project, as proposed, will comply or violate project laws, ordinances, regulations or standards (LORS). 20 CCR 1752 (a) (3). The Committee correctly determined that construction and operation of the proposed CECP power plant will result in numerous LORS violations. See RPMPD, page 9-2. These LORS violations include nonconformance with the following:

- Carlsbad General Plan
- Encina Specific Plan
- Agua Hedionda Land Use Plan
- South Carlsbad Coastal Redevelopment Plan
- The City of Carlsbad PU zoning

b. The use of the CECP to meet the generation needs in the Encina Subarea is not prudent, it is unnecessary overkill.

In previous override determinations, the Commission was faced with serious statewide and regional energy shortages, challenges meeting significant state policy goals, and extreme economic hardships. The CECP satisfies none of these important policy determinations. The basis for its override is typical of any new natural gas power plant and the need for its power is uncertain at best. The CECP, according to page 9-10 of the RPMPD, offers the benefit to: “Provide 540 MW net (558MWgross), of generation in a subarea of the San Diego load area for which the California Independent System Operator has identified a need.”

Both CAISO witness Sparks and CEC Staff Witness Jaske testified that there is an Encina subarea need of 20 to 50 MW for reliability purposes. This level of need, by itself, does not justify the construction of a \$500 million, 540 MW power plant. It can rather be met through a much smaller facility or a transmission upgrade. Although no assessment was made of a smaller

alternative during the proceeding, the RPMPD (page 3-14) deduced that such an alternative might eliminate significant land use impacts and visual impacts. It would obviously also cost significantly less than the CECP. The Committee then dismissed this unanalyzed alternative because it would be less efficient and not fully use existing infrastructure. There is no evidentiary basis for either of these claims. In reality, a smaller plant may allow some of the existing infrastructure to be eliminated, resulting in visual and land use benefits.

Written statements from SDG&E (Exhibit 456), CAISO witness Sparks, and the RPMPD (page 9-6) noted that the Encina subarea need could be satisfied with a transmission upgrade costing approximately \$1 million. The RPMPD concluded that this upgrade is “an uncertain solution” but never had it fully analyzed as an alternative.

Although the Committee’s findings of fact related to override in the RPMPD do not identify the larger regional power needs identified by the CAISO as a benefit, the RPMPD discusses this issue on page 9-8. The Committee reaches the conclusion that it is prudent to approve the CECP based in large part on “projections now available indicate that additional generation is necessary in the San Diego Region...” The Committee is obviously referring to the December 12, 2012, testimony of the CAISO and the initial analysis reflected in Exhibit 199-U. As the Committee is now well aware, that Exhibit was from a PowerPoint presentation made to a stakeholders group the previous week. The CAISO’s draft analysis was not published until January 2012 and because of new information, the CAISO admitted that it needed to modify its analysis in March 2012.

At a CPUC sponsored workshop on April 17, 2012, the CAISO discussed the modifications to its earlier analysis with the CPUC stakeholders. The City of Carlsbad recognizes that workshop was not testimony, it was not recorded, and it is not evidence in the CECP record, however, the workshop pointed out that CAISO’s projected range of additional generation required in the San Diego area in 2021 now ranges from 0 to 211 MW if the three PPA projects are approved. This is significantly less than the range of 231 to 531 MW identified in Exhibit 199-U and referenced in the RPMPD. Other items the CAISO discussed during the workshop that were relevant to the CECP conclusions were:

- Recognition that an “electrically equivalent” location could be in the general SDG&E area and that they had made a study to understand what areas are electrically equivalent
- The analysis did not factor in any demand response programs
- The needs of the Encina subarea could be fixed by SDG&E’s transmission fix.
- Recognition that there are numerous uncertainties in the analysis

Again, the City of Carlsbad recognizes that the CAISO comments at the workshop was not testimony, but even the minor modifications and concerns of other parties, raises questions about the Committee’s reliance on such shaky evidence. The City concurs with the comments of the Center for Biological Diversity regarding the Committees reliance on the CAISO testimony presented orally and in writing at the December 12, 2011, hearing.

c. The benefit of the CECP facilitating closure of the Encina Power Station is unsubstantiated and speculative.

The RPMPD further justifies an override for the CECP on the perceived benefit of closing the Encina Power Station. The findings of fact regarding override state the CECP will: "Further the goals of the State's Once Through Cooling Policies by facilitating the closure of the Encina Power Station."

The Committee, however, selectively uses the closure of the Encina Power Station in this proceeding and here claims the closure of the EPS as a benefit justifying an override. While the City of Carlsbad firmly supports the closure and removal of the EPS, this statement in the RPMPD, however, is pure speculation since the closure of EPS is uncertain. There is nothing in the record that supports the conclusion that the CECP will facilitate closure of the EPS. To the contrary, the applicant has submitted document to the State Water Resources Control Board regarding their intent to modify and maintain the EPS (NPDES Permit Application for the Carlsbad Energy Center LLC, Carlsbad Energy Center Project, San Diego County, August 15, 2008). They also testified in this proceeding that the EPS could operate indefinitely (Sept 13, 2010, Tr. Page 34). There is no firm evidence that the EPS will be closed and removed, particularly as a result of this project. To the contrary, the Applicant has made clear it has no commitment to tear down the Encina units (Sept 13, 2010, Tr. Page 32). The fact that the CECP does not have a power purchase agreement underlines the speculation that this project will ever be built. This fact was also testified to by the applicant. ("Carlsbad Energy Center LLC's Supplemental Testimony, Exhibits, Witness List, And Time Estimates For Examination Of Witnesses," Nov. 18, 2011, pages 6 and 7)

But the Committee cannot have it both ways. If they rely on this benefit to override local LORS, they also need to answer the question of where the project will obtain its water once that benefit is realized.

d. The benefit of the CECP facilitating redevelopment of the ocean front portion of the Encina site is also unsubstantiated and speculative.

The RPMPD goes further by claiming the redevelopment of the EPS site as a benefit. The findings of fact for override state the CECP will: "Facilitate the redevelopment of the ocean front portion of the Encina power plant site and replace the existing generator with modern, efficient, less obtrusive generating units, placed below grade on the portion of the site that is furthest from the shoreline." Like the benefit of closing the EPS, the redevelopment of the site is purely speculative. The Committee made a much appreciated effort to establish a process to allow demolition, remediation, and redevelopment on the EPS site. There is, however, no guarantee or certainty in this decision on whether the CECP will ever be built. As the applicant has testified, the lack of a power purchase agreement makes it uncertain that the proposed CECP project will ever be built. Even if it is, the conditions in this decision establish no requirement on when or whether the EPS will be removed and the site redeveloped. There is certainly no evidence in this proceeding or guarantee in this decision that the ocean front portion of the EPS site will be redeveloped. It is just as likely that NRG or some future property owner will file an application

for yet another power plant on the site and have it approved by the CEC to take further advantage of the existing infrastructure or meet some uncertain but projected future need.

Whether or not the EPS site is redeveloped is purely an economic decision to be made by NRG or another property owner in the future. It is not a benefit used to justify the override of another agency's public policies.

e. The benefit of the CECP reusing the existing infrastructure at the Encina site is also unsubstantiated and speculative.

Finally the RPMPD relies on the use of existing fuel delivery and transmission infrastructure as a justification for override. The City agrees that in some instances, the reuse of existing infrastructure may reduce environmental and other impacts and has economic benefits. In other cases, however, the removal of existing transmission towers and conductors, substations, chain link fencing, gas compressor stations, and other infrastructure in urban areas often reduces blight and can have significant visual and land use benefits. Elimination of the South Bay power plant in Chula Vista and the Hunter's Point power plant in San Francisco are but two examples. While new infrastructure may result in new impacts, those can often be minimized or avoided through the use of modern technology, better siting decision, and less impacting construction methods such as undergrounding. The latter is more likely the case in this situation since the Redevelopment Agency determined that the EPS and all of its associated infrastructure contributes to the blight that exists within the South Carlsbad Coastal Redevelopment Area. (Evidentiary Hearing, 2/1/10, [Kane], p 126)

Other than the City's redevelopment testimony, there is no evidence in this record regarding the potential benefits of removing the existing infrastructure. But there is also no evidence in the record that the reuse of the existing infrastructure is a benefit. It is rather an assumption made by the CEC staff and now the Committee.

f. The other benefits attributed to the CECP are common to any new power plant in California.

The RPMPD relies on four other benefits to justify the use of an override for the CECP. The findings of fact indicates that project will:

- Reduce California's dependence on fossil fuels.
- Reduce the effects of climate change by supporting the integration of renewable energy resources into the electricity system and reducing, on average, the greenhouse gas emissions of the generating system.
- Boost the economy due to the purchase of major equipment, payroll, and supplies, and increased sales tax revenue. Additional indirect economic benefits, such as indirect employment, and induced employment, will result from these expenditures as well.
- Provide construction jobs for an average and peak workforce of 237 and 357, respectively, and approximately 140 jobs during operations. Most of those jobs will require highly trained workers.

All of these attributes are common to any new power plant – renewable or fossil fired – built in California. In the opinion of the City, they do not rise to the level of justifying the override of state and local LORS.

g. Because the public convenience and necessity benefits are illusory and minuscule, there are a number viable alternatives to the CECP that are more prudent.

The second part of the mandated override test is whether there are “not more prudent and feasible means of achieving public convenience and necessity.” The Commission has, to date, failed to consider viable project alternatives that could provide the same public convenience and necessity as the CECP. SDG&E has stated that transmission upgrades would meet the Encina subareas reliability requirement and obviate the need for the CECP. The Committee recognized that a smaller power plant may satisfy this goal as well. The Commission has evaluated smaller projects in the past (See Avenal, Marsh Landing, Contra Costa 8 and High Desert), and had they done so in this case, they may have found that a smaller plant would have satisfied the requirements of the code if it had performed a true analysis rather than a deduction.

V. Alternatives

CEQA requires an environmental document to discuss a reasonable range of alternatives to the proposed project, or to the location of the project, which would feasibly attain most of the objectives of the project but would avoid or substantially lessen any of the significant impacts of the project. (14 Cal. Code Reg. § 15126.6(a) - (c).) With respect to alternative locations, the key question is whether putting the project in another location would avoid or substantially lessen any of the significant impacts of the project. (14 Cal. Code Reg. § 15126.6(f)(2).)

The RPMPD does not comply with CEQA’s fundamental requirement to evaluate a reasonable range of alternatives. Although the CECP is intended to serve SDG&E and the San Diego County region, the FSA did not consider any alternative location outside the City of Carlsbad. The RPMPD reveals that no alternatives outside the Carlsbad city limits were evaluated. CEQA prohibits a public agency from approving a project that has significant environmental impacts if there are feasible mitigation measures or alternatives that could substantially lessen the significant environmental effects. (Pub. Res. Code § 21002; 14 Cal. Code Reg. § 15092(b).) Before it may approve a project with significant unmitigated impacts, an agency must find that there are no feasible alternatives that could avoid or substantially lessen the significant unmitigated impacts. (14 Cal. Code Reg. § 15091(a). Findings regarding infeasibility must be supported by substantial evidence in the record. (14 Cal. Code Reg. § 15091(b).)

The RPMPD fails to comply with CEQA because it does not contain the required finding of infeasibility. Although it found that the CECP will have significant unmitigated impacts on land use, the Revised PMPD does not contain a finding, supported by substantial evidence in the record, that each of the alternatives evaluated is infeasible.

The RPMPD rejected the PPA projects in part because they would not provide the 20 MW of power generation needed in the Encina sub-region. However, the Revised PMPD found that a Reduced Capacity alternative at the CECP site would eliminate the significant unmitigated land use impacts, would reduce the CECP's visual impacts, and would allow for the eventual shutdown of Encina Units 1-5 and redevelopment of the portion lying west of the railroad tracks. (Revised PMPD, p. 3-14.) A Reduced Capacity Alternative at the CECP site may be a feasible alternative that would avoid the CECP's significant unmitigated impacts on land use and would meet the electrical generation needs within the Encina sub-region and the San Diego region. The Commission has, in the past, evaluated smaller units in their Alternatives Analyses (See High Desert Power Project, 97-AFC-1, Final Decision, page 23 and Avenal Power Project, 08-AFC-10, Final Decision, page 18)

VI. LAND 2 and 3

In its initial comments, the City discussed some additional modifications to Conditions of Certification LAND 3. The proposed changes are as follows:

LAND-3. On or before January 1, 2017, project owner shall submit applications for required permits and approvals for demolition, removal, and remediation of the Encina Power Station Units 1 through 5, associated structures, the black start unit, and the exhaust stack.

Upon the commencement of commissioning activities of the project, project owner shall request permission from the California Public Utilities Commission (CPUC) and California Independent System Operator to permanently shut down Units 1 through 5 and the black start unit. The request shall be resubmitted annually thereafter until permission is granted.

Project owner shall seek partners to complete redevelopment of the Encina Power Station according to the Demolition, Removal and Remediation Plan (DRRP) approved by the CPM pursuant to LAND-2. Upon the permanent retirement of Units 1 through 5 at Encina Power Station, Project Owner shall actively pursue fiscally viable redevelopment of the Encina Power Station. Such pursuit could include selling or transferring the land and facilities to a developing entity or entering into a joint venture with one or more developers. ~~The project owner is not expected to commence demolition and remediation of the Encina Power Station absent a viable and funded redevelopment plan that includes future uses of the site that provide the revenue or funds necessary to pay or secure financing for the costs of demolition and remediation.~~ The project owner is not expected to commence demolition and remediation without a Carlsbad approved redevelopment plan. If there is a disagreement between the project owner and the City regarding the viability of the redevelopment plan, the Carlsbad City Council will determine project viability.

VII. Project Fees

**The City of Carlsbad has Repeatedly Requested that
its Schedule of Fees be included in the CEC decision**

During the May 19, 2011, hearing, the City expressed concern regarding the need to require the applicant to pay or reimburse the City for all necessary and appropriate costs, fees, and taxes. The CEC staff explained that such payments were customary and the Committee asked the City to submit any adopted fee schedules. On page 34 of its June 8, 2011, comments on the Presiding Member's Proposed Decision, the City proposed a new socioeconomic condition addressing the fees and included the fee schedule as Attachment 2. The City's proposed condition was:

SOCIO-XX: The project owner shall pay or reimburse the City of Carlsbad for costs incurred in accordance with actual services performed by the City that the City would normally receive for a power plant or transmission line application in the absence of Energy Commission's jurisdiction. These costs include: the citywide Public Facilities Fee imposed by City Council Policy #17; the License Tax on new construction imposed by Carlsbad Municipal Code Section 5.09.030; and CFD #1 special tax (if applicable), subject to any credits authorized by Carlsbad Municipal Code Section 5.09.040; any applicable Local Facilities Management Plan fee for Zone 3 and Zone 13, pursuant to Chapter 21.90.

Verification: The project owner shall provide proof of payment prior to the start of commercial construction.

Dated: April 27, 2012



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ATTACHMENT 1

Record of Conversation

Conversation took place: April 19, 2012

Type of Conversation: Two successive phone conversations

Conversation initiated by: Michael Burge, 760-807-6841

Conversation involved: Escondido Fire Chief Mike Lowry
City of Escondido
760-839-5401

Issue discussed: San Diego Gas & Electric contract with Capstone Fire Management

This conversation was occasioned by the discovery that Capstone Fire Management has leased a vacant fire station from the City of Escondido to house a fire brigade in the city. Chief Lowry confirmed that Capstone has signed such a lease. He stated that he had met with Capstone and San Diego Gas & Electric officials who told him that SDG&E has signed a three-year contract with Capstone by which Capstone will have a full-time fire brigade at the ready to deliver foam to a power plant, if needed, and that Palomar Energy Center in Escondido was the primary focus of the contract. He said Capstone's brigade would be in service 24 hours a day, 365 days a year.

The station is the former Escondido Fire Station No. 3 on Village Drive near West Country Club Lane, roughly five miles from the Palomar Energy Center.

This record prepared by: Michael Burge, April 24, 2012



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 3/27/2012)

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DECLARATION OF SERVICE

I, Flora Waite, declare that on April 27, 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 FINAL 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:

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

- 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