

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

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In the Matter of:

The Application for Certification for the
CARLSBAD ENERGY CENTER
PROJECT

Docket No. 07-AFC-6

**CARLSBAD ENERGY CENTER LLC'S
POST-HEARING BRIEF RELATED TO THE
DECEMBER 12, 2011 EVIDENTIARY HEARING**

January 10, 2012

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I. INTRODUCTION

On December 12, 2011, the Committee for the Carlsbad Energy Center Project (“CECP”) held a further evidentiary hearing on specific topics relating to the application for certification proceeding for CECP (the “December 12th Hearing”). Applicant, Carlsbad Energy Center LLC, presented and made available for cross-examination witnesses for the topics specified. At the end of the hearing, the Committee determined that supplemental briefs would be accepted from all parties on or before January 10, 2012. To that end, Applicant submits the following brief based on the Committee’s instructions presented at the December 12th Hearing.

II. SUMMARY OF TESTIMONY AND KEY POINTS

Based on the evidence presented at the December 12th Hearing, Applicant believes the evidence in the CECP record supports Project approval from the Commission. Nevertheless, Applicant herein summarizes certain issues¹ presented during the December 12th Hearing.

¹ Applicant’s position regarding the Federal PSD issue is not summarized herein as it was thoroughly addressed in Applicant and Staff’s testimony (*see* Exhibits (hereinafter “Exh.”) 199G, 199L-M, 199P, 199T; 229-230; Staff’s Nov. 18 2011 Supplemental Testimony), as well as during the December 12th Hearing. (*See* 12/12/11 Transcript at pp. 188-224.)

A. Conditions of Certification LAND-2 and LAND-3 Provide Additional Community Benefits

Applicant's November 18, 2011 testimony set forth revisions to Land-2 and -3, as well as a detailed discussion supporting the rationale for such revisions. (Exh. 199G at pp. 4-9.)

Applicant herein reiterates its position in its November 18th testimony and at the December 12th Hearing (Exh. 199G at pp. 4-9; 12/12/11 Transcript at pp. 4-9) regarding the language of Land-2 and Land-3.² For the Committee's convenience, the text of Land-2 and Land-3 submitted by Applicant on November 18, 2011 is repeated below:

LAND-2 On or before January 1, 2016, the project owner shall prepare and submit a Demolition, Removal, and Remediation Plan (DRRP) to the CPM, the City of Carlsbad, and the Carlsbad Redevelopment Agency. The DRRP shall propose the process, schedule, and legal requirements for the demolition, removal, and remediation of the Encina Power Station (Units 1 through 5), associated structures, the black start unit and the exhaust stack. As part of completion of the DRRP, project owner shall consult with the California Energy Commission, the California Coastal Commission, the City of Carlsbad, the Carlsbad Redevelopment Agency, the San Diego Regional Water Quality Control Board, the San Diego Air Pollution Control Board, and the California Independent System Operator to ensure the DRRP best reflects the procedural and substantive requirements that will apply to the site.

On or before January 1, 2017, project owner shall prepare and submit to the CPM, the City of Carlsbad, and the Carlsbad Redevelopment Agency, a study of the estimated costs associated with implementing the DRRP.

Verification: On or before January 1, 2016, project owner shall provide the DRRP to the CPM for review and approval and to the City of Carlsbad, the Carlsbad Redevelopment Agency, and the California Coastal Commission for review and comment. The City of Carlsbad and the Carlsbad Redevelopment Agency shall provide comments on the DRRP to the CPM and project owner within 60 days or a date mutually agreeable to project owner and the City of Carlsbad and the Carlsbad Redevelopment Agency.

On or before January 1, 2017, project owner shall submit the results of the study on estimated costs of implementing the DRRP to CPM for review and approval

² Applicant recognizes that the California Supreme Court recently ruled that existing redevelopment agencies cannot engage in new business and must wind down by February 1, 2012. (*See California Redevelopment Association v. Matosantos* (Dec. 29, 2011, No. S194861) ___ Cal. ___ [2011 Cal. LEXIS 13236].) Although the case leaves a lot of unanswered questions, it is likely that the Carlsbad Redevelopment Agency's existing obligations will likely be implemented by a successor agency but it is not clear exactly how much authority such successor agency will have. Thus, the Committee should not impose any Conditions of Certification that require action by the Carlsbad Redevelopment Agency.

and to the City of Carlsbad and the Carlsbad Redevelopment Agency for review and comment.

The City of Carlsbad and the Carlsbad Redevelopment Agency shall provide comments on cost estimate to the CPM and project owner within 60 days or a date mutually agreeable to the project owner and the City of Carlsbad and the Carlsbad Redevelopment Agency.

LAND-3 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 and the black start unit 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. By the requirements of this condition of certification, the project owner is not expected to pursue 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 the costs of demolition and remediation.

Upon the commencement of commissioning activities of the project, project owner shall request permission from the California Public Utilities Commission (CPUC) to permanently shutdown Units 1 through 5 at the Encina Power Station and the black start unit.

Verification: Project Owner shall report to CPM on annual basis the status of the redevelopment efforts at the Encina Power Station.

If the Committee requires a provision be added to Land-2 and/or Land-3 that certain monies be deposited in trust to help facilitate the studies required by Land-2 and Land-3, Applicant respectfully requests that any such addition to Land-2 and/or Land-3 should leave control over expending funds to conduct the studies (and control over the studies themselves) to the project owner or its designee.³ Further, if the Committee determines that such a requirement is necessary, Applicant respectfully requests that any funds remaining in trust after all required studies have been completed be returned to the project owner.

³ In the same vein, if the Committee incorporates such a requirement into Land-2 and/or Land-3, Applicant respectfully requests that the funding of the trust be conditioned upon start of construction (after project owner has obtained all necessary pre-construction approvals), and does not require funding of the trust triggered by CEC approval of the project.

Finally, contrary to the City's assertions⁴, the record is replete with information that CECP provides an extraordinary benefit regardless of whether Land-2 or Land-3 are part of the CECP license. (*See, e.g.*, Exh. 199G at pp. 23-25; Applicant's Post-Evidentiary Hearing Reply Brief (Oct. 11, 2010) at pp. 31-33); 12/12/11 Transcript pp. 78: 4-12; 78:20-79:21; 148:1-15; Exh. 199D; Exh. 409 at 3-7.)

B. Override Findings Can Be Made

The Warren-Alquist Act provides the Commission with exclusive jurisdiction regarding the siting, design and permitting of electric generating facilities. (Pub. Res. Code §§ 25000 *et seq.*) The City belatedly adopted various resolutions and ordinances⁵ on September 27 and October 11, 2011 in yet another attempt to defeat CECP and circumvent the Commission's exclusive authority to certify the Project. The City's recent actions are simply another attempt by the City to prevent CECP from being built within the City's Coastal Zone or the City, and the City acknowledged that that the purpose of the amendments is to "reinforce the city's opposition to the proposed CECP." (*See* City Planning Commission Staff Report, dated September 7, 2011, at p. 4 (attached to City's Supplemental Information for Request for Official Notice (Oct. 24, 2011)⁶.) As applied to the pending CECP AFC, the City's legislative actions are irrelevant as the City undertook such zoning changes in yet another attempt to prevent the approval of CECP; essentially, the LORS amendments were retaliatory in nature. In fact, the City has radically

⁴ *See, e.g.*, Prepared Direct Testimony of Debbie Fountain, Land-2 and Land-3 (Dec. 5, 2011); 12/12/11 Transcript at pp. 225-229.

⁵ The City adopted Resolution 2011-230 (which included General Plan Amendment ("GPA") 11-06 and Local Coastal Program Amendment ("LCPA") 11-06) on September 27, 2011 and adopted Ordinances CS-158, CS-159, and CS-160 on October 11, 2011. Coastal Commission approval is required for LCPA 11-06 and Ordinance CS-158 to take effect.

⁶ An argument can be made that the City's recent actions are essentially spot zoning, solely directed at preventing CECP at the proposed site. The essence of spot zoning is irrational discrimination and the legislative motive is scrutinized by the courts in reviewing such alleged zoning changes. (*See Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1536; *see also Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900.) Specifically, when the zoning ordinance(s) appears to subject a property owner to a special restriction not applicable to similarly situated adjacent property, courts will conduct a more searching inquiry into the reasons and motives of the legislative body to determine if the zoning is arbitrary and discriminatory. (*Id.*; *see also Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338; *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 962-63.)

changed its position after inviting Cabrillo to host the Poseidon Desalination project on its land and “make concessions” in reasonable reliance in support for the modernization of the powerplant on the NRG-owned property (*i.e.*, a smaller, more efficient powerplant located between the railroad tracks and I-5). (*See* Exh. 409 at pp. 3-7; Exh. 194.)

Further, as noted above, the CEC has exclusive jurisdiction over the siting of CECP. Thus, in essence, the pending CECP process is insulated from the City’s recent changes. Regardless of whether CECP complies with LORS, the requirements for an override are met. Here, since all potentially significant environmental impacts are mitigated, an environmental override pursuant to CEQA is not necessary. Regarding a nonconformance override, Public Resources Code section 25525 expressly provides, as follows:

The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

(Pub. Res. Code § 25525.) Thus, the findings in support of a nonconformance override must demonstrate (a) that CECP is required for public convenience and necessity, and (b) there are not more prudent and feasible means of achieving public convenience and necessity.

As noted in Applicant’s opening testimony (Exh. 199G at pp. 22-23), the phrase “public convenience and necessity” (as it appears in Public Utilities Code section 1001) is construed broadly and “any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary.” (*See* Metcalf Energy Center (“Metcalf”) (99-AFC-3) Final Decision at p. 464 (Sept. 24, 2001); *see also* El Segundo Power

Redevelopment Project (“ESPR”) (00-AFC-14) Final Decision at p. 296 (Feb. 2, 2005).) In previous licensing proceedings, the CEC has determined that it “is inescapable that electrical energy is essential to the functioning of contemporary society” and since the project “will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy,” the CEC has concluded that the project is required for public convenience and necessity. (Metcalf (99-AFC-3) Final Decision at p. 464; *see also* ESPR (00-AFC-14) Final Decision at p. 297.)

The second requirement for the Commission to issue an override is that there are not more prudent and feasible means of achieving public convenience and necessity. (Pub. Res. Code § 25525.) This determination must be made based on the totality of the evidence of record and consider environmental impacts, consumer benefits, and electric system reliability. (*Id.*) To that end, CECP has no significant, unmitigatable environmental impacts. In fact, CECP’s numerous benefits and support of reliability throughout the SDG&E service area justify an override - if the Committee deems one is needed for CECP. (*See, e.g.*, Exh. 199G at pp. 23-25; Applicant’s Post-Evidentiary Hearing Reply Brief (Oct. 11, 2010) at pp. 31-33; 12/12/11 Transcript pp. 78: 4-12; 78:20-79:21; 148:1-15.) Moreover, the three PPA projects are not a replacement to CECP and, even in the event that all three PPA projects become operable (which still remains speculative at best), there is still need for CECP at its proposed site. (*See, e.g.*, 12/12/11 Transcript pp. 78: 4-12; 78:20-79:21; 83-88:13; 148:1-15.)

At its proposed location, CECP will provide significant reliability and value within the Carlsbad area, the entire San Diego region, and the State of California. The proposed location is the most logical place for CECP and the Encina subarea has a demonstrated need for CECP. (12/12/11 Transcript pp. 83-84.) Further, the Coastal Act specifically contemplates the

continued use of existing facilities and reasonable expansion of such uses within the Coastal Zone because the resources, infrastructure, and compatible uses already exist in the vicinity of existing power plants. (*See* Pub. Res. Code § 30260.)

It is clear that CECP is required for public convenience and necessity and has significant benefits. Further, there are not more prudent and feasible means of achieving public convenience and necessity. Therefore, the requirements of Public Resources Code section 25525 are met, thus mandating the issuance of override findings if the Commission first determines that CECP requires an override for Project approval.

C. CECP is Important to California's Future

CECP is important for the future of the Encina subarea, as well as the San Diego region and the State of California. CECP allows for furtherance of the State Water Resources Control Board's goals set forth in the Once-Through Cooling Policy (Docket # 56916) by allowing for the retirement of EPS Units 1-3. (*See also* Applicant's 10/11/10 brief at pp. 11-14.) CECP also provides for coastal renewal along the Carlsbad coastline by allowing for the retirement of EPS Units 1-3, and even more so if the CECP is approved with the modifications to proposed Conditions of Certification Land-2 and Land-3 as set forth herein.

Moreover, as discussed at length during the December 12th Hearing, CECP allows for grid stability and electric reliability at a time of increasing strain and questionable reliability within the SDG&E service area. (*See* 12/12/11 Transcript at pp. 78: 4-12; 78:20-79:21; 83-88:13; 148:1-15.) Lastly, CECP furthers California's renewable energy policy by providing steady, reliable power that will support the growth of intermittent renewable energy throughout the state.⁷ (*See also id.*)

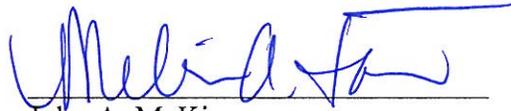
⁷ *See* Renewable Power in California: Status and Issues at p. 13 (rev. Dec. 30, 2011) (Exh. 655) (stressing that grid integration is key and "as more renewable generating facilities are added to the system, it will become increasingly challenging to maintain system reliability and stability . . . complementary technologies like natural gas-fired power plants, energy storage, and demand response can be used to provide integration services. Natural gas units can provide quick startup, rapid ramping, regulation, spinning reserves, and energy when intermittent resources are not available.")

III. CONCLUSION

Applicant believes that the record for this proceeding contains the information necessary for this Committee to prepare a Revised Presiding Member's Proposed Decision that sets forth a comprehensive environmental analysis of the proposed Project, which will allow the full Commission to make a favorable decision for the Applicant and the citizens of the State of California.

Date: January 10, 2012

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APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 11/29/2011)

CARLSBAD ENERGY CENTER LLC

Applicant's Post-Hearing Brief Related to December 12, 2011 Evidentiary Hearing

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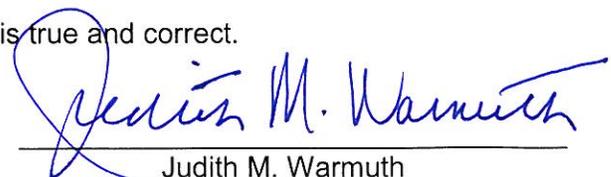
DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on January 10, 2012, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

AND/OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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



Judith M. Warmuth