

STATE OF CALIFORNIA  
CALIFORNIA ENERGY COMMISSION

California Energy Commission <b>DOCKETED</b> <b>07-AFC-06</b>
TN # 65965 JUN 26 2012

In the Matter of )  
Application for Certification for the )  
Carlsbad Energy Center Project )  
(CECP) )  
\_\_\_\_\_ )

Docket No. 07-AFC-6

Intervenors City of Carlsbad and City of Carlsbad  
as Successor Agency to the former Carlsbad Redevelopment Agency  
Petition for Reconsideration

June 26, 2012

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Procedural Background

At its business meeting of Thursday, May 31, 2012, the Commission unanimously adopted the Revised Presiding Member's Proposed Decision ("RPMPD") with a few changes incorporated in errata sheets. The City and the Redevelopment Agency (now represented by the City as successor agency) objected to the RPMPD and the errata. As was explained to the Commission, there were numerous legal deficiencies in the RPMPD but the Commission adopted it anyway.

Now that the Commission has issued its order, it is appropriate to file this motion for reconsideration for three of the conditions of approval. These conditions should be amended to comport with the Commission's own regulations, to ensure fairness to the affected community, and to fulfill the expressed desires of the individual commissioners as will be explained fully below.

**AUTHORITY FOR RECONSIDERATION**

This petition for reconsideration is filed pursuant to section 25530 of the Warren-Alquist Act which states:

"The commission may order a reconsideration of all or part of a decision or order on its

own motion or on petition of any party.

Any such petition shall be filed within 30 days after adoption by the commission of a decision or order. The commission shall not order reconsideration on its own motion more than 30 days after it has adopted a decision or order. The commission shall order or deny reconsideration on a petition therefor within 30 days after the petition is filed.

A decision or order may be reconsidered by the commission on the basis of all pertinent portions of the record together with such argument as the commission may permit, or the commission may hold a further hearing, after notice to all interested persons. A decision or order of the commission on reconsideration shall have the same force and effect as an original order or decision.”

Pub. Resources Code, § 25530

#### ARGUMENT

#### A Condition Should be Added Requiring the Payment of Development Impact Fees Prior to the Commencement of Construction

Nowhere in the Commission’s order are development impact fees discussed. The City’s schedule of development fees was submitted as part of its comments to the PMPD. It is included again as Exhibit A to this Petition.

Development impact fees are those fees associated with the privilege of developing property (*Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554; *Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n* (2008) 163 Cal.App.4th 215; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854; *Associated Home Builders v. City of Walnut Creek* (1971) 4 Cal.3d 633). Development impact fees are fees imposed by local governments in order to defray the impacts of proposed development. In this case, the proposed power plant would be the largest (save for the existing power plant) building in the City of Carlsbad. It will have development impacts on a variety of major facilities including sewer, traffic and drainage facilities and the Agua Hedionda Lagoon. All developers within the City of Carlsbad (except for some other governmental agencies) are subject to payment of

these impact fees. There are no development impact fees imposed solely on power plants in Carlsbad.

Development impact fees are defined in state law under Government Code section 66000 et seq. Section 66000 defines development impact fee as:

“a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4, or fees collected pursuant to agreements with redevelopment agencies that provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code).” Gov. Code, § 66000 (emphasis added).

The California Supreme Court has upheld the imposition of development impact fees as a prerequisite to granting a development permit so long as the fees are roughly proportional to the impact of the proposed development (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854). This is exactly the case in this situation. Development impact fees will be exacted on those impacts resulting from the development. For example, where there is no residential component to this development, there will be no park-in-lieu fees which are based on a formula using residential densities. The same would be true for habitat mitigation fees where there is no coastal sage grassland or other habitat to be disturbed. However, where a development impact fee is imposed as a result of the developments size or value, there will be a fee. In this case, the appropriate development impact fees are the public facilities fee which is 3.5% of the building permit value, the sewer benefit area fees, the traffic impact fee, water

district fees for connection to the potable system, planned local drainage area fees and local facilities master plan fees.

Development impact fees are not processing fees, which are intended to defray the cost of processing development applications (Gov. Code, § 65909.5). In this case, much of the processing of the development has and will be done by this Commission; it is not the intention of the City to try and collect fees for something it has not processed, rather it is to treat the proposed power plant the same as any other development within the City and to subject it to the normal and customary development impact fees.

Adding a condition to specifically spell out the development impact fees that the power plant will be required to pay will benefit all parties by preventing any future controversies or arguments as to whether or not the payment of such fees is appropriate. Requiring payment of applicable impact fees is consistent with this Commission's regulation 1715(a)(1) which states:

“(1) Local agencies shall be reimbursed for costs incurred in accordance with actual services performed by the local agency, provided that the local agency follows the procedures set forth in this section. These costs include:

(A) permit fees, including traffic impact fees, drainage fees, park-in-lieu fees, sewer fees, public facilities fees and the like, but not processing fees, that the local agency would normally receive for a powerplant or transmission line application in the absence of Commission jurisdiction” Cal. Code Regs. tit. 20, § 1715 (emphasis added).

Simply stated, but for the paramount jurisdiction of this Commission, those fees would normally be imposed by the City and paid as a condition of development. The Commission should do likewise since nothing in the Warren-Alquist Act exempts their payment.

Development impact fees would be due at the issuance of grading or building permits. Since these development impact fees can be calculated at the time of commencement of construction, and there is no budget the city can submit at this time, there is no need to require the City to apply for them later. They are simply imposed by local law and calculated according to the formulas contained in the applicable LORS.

Development fees are paid into a fund which is used by the City to pay for needed improvements to public facilities. In Carlsbad the fees were established by resolution or ordinance of the City Council. For example, the Public Facilities Fund (“PFF”) was established in 1979 by resolution of the City Council which is attached hereto as Exhibit “B”. The fees collected from all developers in Carlsbad are placed into a special fund which, when sufficient funds are available, is used to pay for the construction of the capital improvement necessary to offset the impacts. In the case of the PFF fees, these funds are used to build the following facilities:

- police facilities,
- maintenance and yard facilities,
- libraries,
- city offices,
- parks,
- major streets,
- traffic signals,
- storm drains,
- bridges, and
- fire stations.

Other development impact fees are used to pay for such things as parking facilities, drainage facilities, sewer facilities, administrative facilities and the like. In this sense the funds are collected first and then used to reimburse the City for the costs of construction of needed public facilities. The funds must be used or committed to specific facilities within 5 years or they are returned to the developer (Gov. Code §66001(e).)

Therefore, we recommend the following condition be added:

SOCIO-1: Prior to the commencement of construction, the project owner shall pay the development impact fees adopted by ordinance or resolution of the Carlsbad City Council as set forth in Exhibit C which shall be paid on or before the commencement of construction.

Verification: Prior to the commencement of construction, the project owner shall provide proof of payment to the CPM for approval.

Condition LAND-1 Should be Revised to Require the Property Owner to Provide a Temporary Coastal Rail Trail under Specified Circumstances

Condition LAND-1 (and Worker Safety-9) precludes a dedication of an easement for the Coastal Rail Trail east of the railroad tracks. Given the uncertainty that the CECP will ever be constructed, the City offered alternate language to require the CECP to establish a temporary Coastal Rail Trail on the east side of the railroad in the event the CECP fails to start construction. The City is not asking that this temporary trail be established until the trail segment to the north across the Agua Hedionda lagoon is completed. The Vista/Carlsbad Interceptor Sewer and Agua Hedionda Lift Station project is in final design and construction is anticipated to begin in late 2012 or early 2013. The bridge work is expected to be complete in mid to late 2014. If the CECP has not broken ground by the completion of the bridge, it is appropriate to require the property owner to create a temporary trail (asphalt and fencing) with no amenities (e.g., no benches or water fountains) until the CECP breaks ground. This condition does not prejudice the project in any way. It is only temporary and would benefit the community which heretofore has had a difficult time seeing any benefit.

In view of the construction timing, the fairness of creating a benefit to the community and the absence of prejudice to the applicant, the City recommends revision of condition LAND-1 is as follows:

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

connect the segments of the Coastal Rail Trail north and south of the Encina parcel. It shall revert to the applicant upon commencement of construction of the power plant.

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

Condition LAND-2 Should be Revised to Give Effect to the Commissioner's Intent that the Encina Plant be Dismantled and Removed

During discussion of this item at the business meeting of May 31, 2012, the Commissioners individually supported the City's desire to see the existing Encina Power Station dismantled and removed. The Commissioners individually expressed hope that this proposed project would facilitate that occurring sometime in the future. However, this was not made an express condition of certification. This omission can and should be remedied so that dismantling and removal of the Encina Power Station will become a certainty in the future if the CECP is constructed. Dismantling and removal of the Encina Power Station would not be based on an arbitrary timetable but instead would depend on a series of events which must happen in order to the CECP to be constructed. With that in mind, the City recommends the following condition be amended in order to allow that certainty:

LAND-2: Upon the permanent retirement of Units 1 through 3 at Encina Power Station, Project Owner shall actively pursue fiscally viable redevelopment of the Encina Power Station, Project Owner shall actively pursue fiscally viable redevelopment of the

Encina Power Station. submit to the City of Carlsbad a redevelopment plan which shall set forth an alternative use for the land and site now occupied by the existing Encina Power Station. Once approved by the City Council, the existing power plant must be demolished and removed within two years of obtaining all required approvals for the de-commissioning of units 4 and 5. Such permissions shall be diligently sought.

Verification: The project owner shall report to the CPM on an annual basis the status of the redevelopment efforts and the decommissioning efforts at the Encina Power Station. Within 60 days of receiving the report, the CPM shall schedule and hold a public workshop to present the report and solicit public comments and questions on it.

The City and the former Redevelopment Agency also seek reconsideration of the Commission's decision with respect to review by the California Supreme Court of the following legal issues on the grounds and for the reasons which have been previously raised by the City and former Redevelopment Agency in these proceedings:

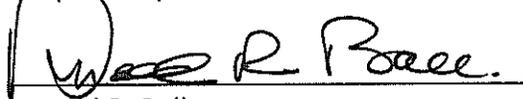
1. Did the California Energy Commission fail to proceed in a manner required by law when it did not obtain a coastal report from the California Coastal Commission for the licensing of a power plant in the coastal zone in Carlsbad, California?
2. Did the California Energy Commission fail to proceed in a manner required by law when it overrode inconsistencies with the California Coastal Act without the coastal report prepared by the California Coastal Commission?
3. Can the California Energy Commission override inconsistencies in the Coastal Act without preparing its own coastal report?
4. Can the California Energy Commission override unspecified inconsistencies in the California Coastal Act by adopting a finding overriding all inconsistencies?
5. Did the California Coastal Commission properly apply California Coastal Act, Public Resources Code sections 30101 and 30260?

6. Did the California Energy Commission fail to meet and consult with the local governing entity after it identified inconsistencies with the local law?
7. Did the California Energy Commission proceed in excess of its jurisdiction when it preempted the local fire official and the California Fire Code?
8. Did the California Energy Commission fail to override amendments to the 2000 edition of the California Fire Code?

CONCLUSION

This petition for reconsideration represents the Commission's final chance to demonstrate its willingness to amend conditions so that they appropriately defray the costs to the City of Carlsbad and the Redevelopment Agency of the impacts on their local citizens resulting from the construction of this project. It allows the Commission to require the applicant to provide a temporary benefit to the citizens of Carlsbad which are eagerly anticipating completion of the coastal rail trail system. Finally, it represents the Commission's last chance to reexamine conditions Land-2 and Land-3 which as amended as proposed by the City will present a palpable benefit to the community, and to reconsider the error of law previously raised in these proceedings.

Respectfully submitted,



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DECLARATION OF SERVICE

I, Flora Waite, declare that on June 26, 2012, I served and filed a copy of the attached Intervenor City of Carlsbad and the City of Carlsbad as successor agency to the former Carlsbad Redevelopment Agency Petition for Reconsideration. 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](http://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  
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**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:

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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



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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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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