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September 6, 2013

California Energy Commission
Dockets Unit
1516 9th Street, MS-4
Sacramento, CA 95814
Docket No. 07-AFC-1C

Re: **City of Victorville's Comments on Mr. Robert Landwehr's Petition for Reconsideration of a Decision to Extend the 5-year Construction Deadline for the Victorville 2 Power Plant Project (TN# 71549); Docket No. 07-AFC-1C; September 11, 2013 Business Meeting Agenda Item No. 8**

Honorable Energy Commission Members:

I am the City Attorney for the City of Victorville ("City"), and a partner in the law firm of Green, de Bortnowsky & Quintanilla, LLP. For over a decade, our firm has provided legal services to a variety of municipalities, special districts and other public entities, and I am quite familiar with the provisions and requirements of the Ralph M. Brown Act (Gov. Code § 54950 *et seq*., hereinafter the "Brown Act"). I write on behalf of the City in response to the above-referenced petition filed with the California Energy Commission ("CEC") by Mr. Landwehr in Docket No. 07-AFC-1C on July 11, 2013, and in response to some of the other filings Mr. Landwehr references therein.

As stated in my letter to the City Council, which was filed with the CEC in this proceeding on May 31, 2013 (TN #71053), Mr. Landwehr's allegations that the City Council violated the Brown Act are without merit. Although it seemed unnecessary to provide a detailed explanation at that time, we appreciate the opportunity to now provide the CEC with additional facts.

In an open and public meeting held on April 16, 2013, of which public notice was properly given on April 11, 2013 by posting of an agenda in accordance with the requirements of the Brown Act,[1] the City Council considered and approved Resolution No. 13-009, expressing its support for City Staff's filing with the CEC of the Petition for Extension of the Construction Deadline for the Victorville 2 Hybrid Power Project ("VV2 Petition"). Resolution No. 13-009 further contained a copy of the VV2 Petition so filed.[2] Also, at that same meeting, the City Council considered another properly agendized item approving the payment of annual energy facility compliance fees to the CEC for the VV2 project.

At its April 16, 2013 meeting, the City Council discussed both of the aforementioned items in open session, and the public was provided with an opportunity to comment on any item appearing on the agenda at the opening of the meeting.[3] It is further important to note that the City Council had the discretion to approve or not approve either or both of these items, and if the VV2 Petition was not properly authorized by the City Council, it could have been withdrawn. Therefore, more than two (2) months prior to the CEC considering the item at its June 12, 2013 business meeting, the City had provided ample public notice under the Brown Act that the VV2 Petition had been filed, and provided the public, including Mr. Landwehr, with an opportunity to comment on same. As Resolution 13-009 was properly agendized, considered and discussed in compliance with the Brown Act, Mr. Landwehr's request for "nullification" of this Resolution in order to "cure and correct" a perceived Brown Act violation is simply absurd.

While it is true that Brown Act section 54960.1(c)(2) says that "[w]ithin 30 days of receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action," the very next subdivision of that section provides that a legislative body need not do so. Should it fail to notify or cure and correct within 30 days, such non-response is deemed to be a decision by the legislative body not to cure and correct.[4] Having no reason to believe it violated the Brown Act, the City was under no obligation to cure and correct and likewise was not required to respond to a meritless request to do so.

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[1] Brown Act section 54954.2(a)(1) requires an agenda for a regular city council meeting to be posted a minimum of 72 hours in advance of the time the meeting is to be held. Here, the City provided more notice than is required by the Brown Act, and it is the City's usual custom and practice to do so.

[2] However, the mailing list filed with the VV2 Petition was not included to guard against an inadvertent violation of Gov. Code § 6254.21 which prohibits the posting of the addresses and telephone numbers of public officials on the Internet. Brown Act section 54954.2(a)(1) requires a city to post copies of its agendas on its Internet Web site.

[3] The public comment period is also a Brown Act requirement (Gov. Code § 54954.3).

[4] Gov. Code § 54960.01(c)(3).

Mr. Landwehr's allegation that the City Manager had no authority to even file the VV2 Petition with the CEC is further without merit. For the past several years, the City Manager, together with City Staff and the City's former consultant, took many actions with respect to VV2, such as preliminary negotiations with potential buyers/developers and applying for permits and other entitlements. Not every action taken by a City Manager requires advance approval of the City Council, and it is common for a City Manager, as "administrative head of the government of the City,"[5] who is charged with, among other matters, a duty to "exercise general supervision over all public buildings, public parks and all other public property which are under the control and jurisdiction of the city council,"[6] to take administrative steps to protect and preserve City property as far as possible prior to seeking, when necessary, City Council support or approval. This is precisely what happened with the VV2 Petition. If the City were trying to hide its actions, why would it put two items on a public agenda, posted in accordance with the Brown Act on April 11, 2013, specifically explaining to City Council and the public what had been filed with the CEC on VV2 and confirming the City Council's support thereof?

Furthermore, while it is true that the City filed an action in eminent domain against Mr. Landwehr (and the other part owners of the property, hereinafter collectively the "Landwehrs") to take Parcel No. 0460-242-05,[7] and that the Landwehrs vigorously opposed that taking, it is inaccurate for Mr. Landwehr to characterize the end result of that action as he does by claiming that "on June 27, 2011, the court granted our motion for the return of our family property."[8] The reason the court issued an order for return of the property was <u>because the City had elected to abandon its eminent domain proceeding for Parcel No. 0460-242-05 and dismiss the proceeding, which abandonment and dismissal the Landwehrs then OPPOSED</u>. The City prevailed on its motion to dismiss pursuant to a court order issued on January 11, 2011, and the court restored the parcel to the Landwehrs on June 27, 2011, after they filed a motion against the City seeking damages, costs and attorney's fees (in the amount of $38,400.00) and restoration of the parcel. The court subsequently awarded the Landwehrs only $5,892.32 of the fees, costs and damages sought.

Among other *non sequiturs*, Mr. Landwehr further mentions in his various filings with the CEC a pending action involving the SEC and a prior Grand Jury investigation. The SEC action (like the now-dismissed eminent domain action against the Landwehrs) has no bearing on the City's VV2 Petition. The Grand Jury investigation was completed in June of 2012. The City responded to all of the allegations and no further action was taken.

[5] Victorville Municipal Code § 2.04.070.
[6] Victorville Municipal Code § 2.04.180.
[7] Case No. CIVVS 804132, California Superior Court, San Bernardino County Victorville Branch.
[8] *See* Mr. Landwehr's Request for Revocation of Certification and Associated Civil Penalties (TN# 71337) filed on June 17, 2013 at page 3.

Finally, Mr. Landwehr has continually alleged in his various filings that both the City and the CEC are in violation of Public Utilities Code section 625(a)(1)(A), a section that appears to apply only to certain types of condemnation actions for public utilities under the jurisdiction of the California Public Utilities Commission, not the CEC. Not only do we believe this section is inapplicable to the City and the CEC, but even if it were applicable, the City is not presently seeking to condemn Mr. Landwehr's property.

Mr. Landwehr's allegations are nothing more than a weak attempt to confuse the CEC by alleging half-truths and mistruths. Despite these allegations, the City has complied with the law every step of the way. The City hereby submits these comments in opposition to Mr. Landwehr's Petition for Reconsideration and appreciates the CEC's consideration hereof.

Very truly yours,

GREEN, de BORTNOWSKY & QUINTANILLA, LLP

ORIGINAL SIGNED BY

Andre de Bortnowsky

AdB:law
cc: Doug Robertson, City Manager
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