

DOCKETED

Docket Number:	07-AFC-06C
Project Title:	Carlsbad Energy Center - Compliance
TN #:	202683
Document Title:	Pre-Hearing Brief in Favor of the Commission Processing the Petition to Remove Separately from the Petition to Amend
Description:	N/A
Filer:	Dee Hutchinson
Organization:	Locke Lord LLP
Submitter Role:	Applicant Representative
Submission Date:	7/11/2014 4:29:01 PM
Docketed Date:	7/11/2014

**STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission**

In the Matter of:

Docket No. 07-AFC-06C

**Petition to Remove Obsolete Facilities
to Support Construction of the Carlsbad
Energy Center Project**

and

**Petition to Amend the Carlsbad Energy
Center Project**

**CARLSBAD ENERGY CENTER LLC'S
PRE-HEARING BRIEF IN FAVOR OF THE
COMMISSION PROCESSING THE PETITION TO REMOVE
SEPARATELY FROM THE PETITION TO AMEND THE
CARLSBAD ENERGY CENTER PROJECT**

July 11, 2014

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I. INTRODUCTION.

The California Energy Commission Decision on the Carlsbad Energy Center Project (the “**Final Decision**”) authorized the construction and operation of the Carlsbad Energy Center Project (“**CECP**” or the “**Project**”), including the removal of three (3) fuel oil storage tanks (“**FOSTs**”) at the project location (collectively, the “**Original FOSTs**”). On April 29, 2014, Carlsbad Energy Center LLC (“**Project Owner**”) filed at the California Energy Commission its Petition to Remove Obsolete Facilities to Support Construction of the Carlsbad Energy Center Project (the “**PTR**”). In the PTR, Project Owner requested Energy Commission consent to remove three (3) additional FOSTs (Tanks 1, 2 and 4) (collectively, the “**Additional FOSTs**,” and individually, “**FOST 1**,” “**FOST 2**,” or “**FOST 4**,” respectively) situated around the CECP site when Project Owner removes the Original FOSTs (Tanks 5, 6 and 7).

After the Final Decision, an alternative configuration that is more environmentally friendly and better suited to the load serving entity’s current and future needs to support renewable integration has been identified. On May 2, 2014, Project Owner filed its Petition to Amend (the “**PTA**”) the Carlsbad Energy Center Project, which proposes to replace certain Project components with upgraded equipment. Due to the temporal proximity of the PTR and the PTA filings and in response to intervenor concerns, on June 27, 2014 the Commission issued the Notice of Public Site Visit, Environmental Scoping Meeting and Committee Conference, Additional Committee Conference, and Committee Order for Briefs (CEC TN 202623) (the “**Committee Order**”)

regarding whether the Commission should process the PTR separately from the PTA. (Table 1 Exhibit 0006.) During this process, the Commission will evaluate the site clearing actions proposed in the PTR. Project Owner accordingly submits this Brief in support of the Committee conducting separate deliberations on each petition.

II. SUMMARY OF ISSUES AND KEY POINTS.

The evidence in the CECP record, including the evidence contained in the PTR, the PTA, and other documents filed at the Commission in relation to those petitions, supports Commission consideration of the PTR as a separate modification of the licensed project from the PTA. This Brief contains Project Owner's Exhibit List in the attached Table 1, which is incorporated by this reference. More importantly, the law permits the Commission to employ such a review process in this situation.

A. The FOST Removals Will Benefit Whichever Version of CECP Is Built.

Commission Approval of the PTR will further development of CECP, regardless of whether the Commission approves the facility redesign proposed in the PTA. Although the PTA operates on the assumption that the PTR actions are taken, the PTA's objective is a power plant redesign, not removal of obsolete facilities nearby. The PTR actions can be taken regardless of the result of the PTA, and the Project as proposed in the PTA can be constructed without removal of FOSTs 1 and 2. Therefore, these petitions each stand on their individual merits and should be considered accordingly.

Commission approval of PTR modifications separately from the PTA modifications would allow Project Owner more flexibility at the site during construction of CECP, thereby reducing the potential for site use, site access and construction coordination issues. Such issues can cause project delays, and consequently, cost overruns and friction with the community when a project continues longer than planned.

In addition, PTR approval would allow Project Owner to honor its commitments to the City of Carlsbad (the "City") by removing all FOSTs as soon as possible. (See Settlement Agreement in Appendix 2A of PTA, Table 1 Exhibit 0003.) Project Owner has worked closely with the City to resolve differences that arose during the original Project licensing procedure. Current removal would allow Project Owner to achieve the City's, the Commission's and Project Owner's objectives of improving views of the ocean and freeing up land for alternate, beach-friendly uses. (See Appendix 2A of PTA, Table 1 Exhibit 0003.)

Consolidating the FOST removals benefits the environment by removing all fuel oil storage tanks from the site and allowing a single mobilization for that procedure. A single mobilization decreases air pollution and other minor negative impacts attributable to the removal process. Moreover, the FOST removals benefit the community by visually enhancing the coastline, improving local ocean views, and reducing the time the community must endure construction-related impacts such as increased noise and traffic.

In addition to the aforementioned benefits, the PTR provides for removal of the Additional FOSTs to improve access to the CECP construction area, accommodate construction worker parking and provide laydown areas for construction materials and equipment. Construction of either version of

the CECP—the currently licensed version or the version proposed in the PTA—would benefit from expanded access to and at the Project site, and additional construction laydown and parking areas afforded by the PTR actions.

B. The Petitions Are Separate and Distinct; Therefore They Can And Should Be Evaluated Accordingly.

The procedure set forth by the Commission for review of both the PTR and the PTA provides the public with ample opportunity to comment on the project modifications, and the Commission itself to evaluate the cumulative environmental effects of the actions proposed in both petitions. [See the Committee Order for Briefs (CEC TN 202623); see also California Code of Regulation §1769(a).] On June 27, 2014, the Commission provided public notice of (a) the opportunity to provide written comments to the Committee by July 31, 2014 (20-days following the due date for Project Owner’s brief on this subject), (b) the Commission’s site visit on August 7th and associated opportunity to discuss the project with the Commissioners; and (c) yet another opportunity to provide public comments at the Committee Conference on August 25th. Specifically, the Commission allotted the Committee nearly two months to analyze the PTR (June 27 to August 25), and nearly one month (July 31 to August 25) to evaluate the Project Owner’s and the public’s comments on the issue of whether to assess the PTR and PTA as separate petitions to amend the CECP.

The PTR proposal to add parking and laydown areas in the footprints of FOSTs 1 and 2 is separate and distinct from the PTA proposal to modify the project design, and should be treated accordingly by the Commission. As these actions relate to different aspects of the Project, the Committee may consider the PTR as a separate modification of CECP from the PTA. As previously noted, removal of the Additional FOSTs is a necessary element of the Project, can proceed regardless of whether the PTA is ultimately approved by the Commission, and would not alter the environmental envelope of the entire Project.

From an environmental perspective, the requested tank and related equipment removals in the PTR are nearly identical to those approved by the Commission in the Final Decision. Project Owner’s Application for Certification already analyzed the environmental impact of removing 3 FOSTs. Environmental impacts of incorporating the Additional FOSTs into the Project’s removal schedule were evaluated in the PTR and determined to be insignificant on balance. (See PTR, Table 1 Exhibit 0002.)

C. Commission Authority And Precedent Support Separate, Concurrent Review Of These Petitions.

California’s legislature granted the Energy Commission broad authority to “prescribe the form and content of applications for facilities ... and formally act to approve or disapprove applications, including specifying conditions under which approval and continuing operation of any facility shall be permitted.” (CA Pub. Res. Code §25216.5.) The Commission’s expansive powers logically extend to its review of petitions to modify an existing facility, as the Legislature required the Commission’s powers and duties to be “liberally construed, in order to carry out the objectives of this division.” (CA Pub. Res. Code §25218.5.) Furthermore, the Commission may order “the severance of part of any notice or application proceeding, if reasonably necessary to ensure the complete, fair, or timely consideration of any siting proposal.” (Title 20 Cal. Code of Regulations

§1719.) The Commission’s chairman may also “[r]egulate the conduct of the proceedings and hearings, including, but not limited to, disposing of procedural requests.” [Title 20 Cal. Code of Regulations §1203(c).] Therefore, the Committee and the Commission’s chairman are empowered to grant Project Owner’s request to approve these petitions independently. As Project Owner explains in this Brief, the Project and the public benefit from separate consideration of these petitions.

Other projects under California Energy Commission jurisdiction that have had two or more separate petitions under consideration by the Commission contemporaneously include the El Segundo Energy Center, the Blythe Transmission Line, the Colusa Generating Station, and the Sutter Energy Center projects.

D. Applicable Law Does Not Prohibit The Commission From Conducting Independent, Contemporaneous Deliberations On Two Petitions To Modify An Approved Project.

Laws applicable to the PTR and the PTA, including the Warren Alquist Act, the California Environmental Quality Act (“CEQA”), and legal precedent permit separate submission of petitions or independent consideration of petitions for project modifications. (See e.g. California Code of Regulation §1769.) Where CEQA is silent, “[t]he Legislature has expressly forbidden courts to interpret CEQA or the regulatory guidelines to impose ‘procedural or substantive requirements beyond those explicitly stated’ in the act or in the guidelines. (Cal. Pub. Res. Code §21083.1; see also *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907 ... [Legislature limited CEQA’s scope].” *South Orange County Wastewater Authority v. City of Dana Point* (4th Dist. 2011) 196 Cal.App.4th 1604, 1617.

1. The PTR Demolition Activities Do Not Warrant The Same Level Of Review As The Project Design Updates Proposed In The PTA.

Once the Energy Commission issues a final decision, a project owner must file with the Commission “a petition for any modifications it proposes to the project design, operation, or performance requirements.” [California Code of Regulations §1769(a), emphasis added.] Because the PTR does not propose modifications to the design, operation or performance requirements of the approved Project, this rule does not require Project Owner to subject the PTR to the extensive, public scrutiny currently given to it by the Commission and intervenors. This statute does require Commission consent to the extensive project modifications Project Owner proposed in the PTA, however. Project redesigns like the one proposed in the PTA deserve the higher level of Energy Commission and public scrutiny prescribed in this statute. [See CCR §1769(a).]

Project Owner carefully prepared both the PTR and the PTA to provide sufficient analysis to satisfy the thorough review to which California Code of Regulations Section 1769(a) requires the PTA to be subjected. The Commission’s data request procedures and hearings are fact-finding procedures designed to ensure that any modifications to project design, operation or performance requirements will not have a significant, unmitigated impact on the environment, will not alter or delete a condition of certification, and will allow the project to continue to comply with applicable laws, ordinances, regulations or standards (“LORS”). [CCR §1769(a).] The Additional FOST demolition, however, merely duplicates actions analyzed and approved in the Project Owner’s

Application for Certification and the Final Decision, and is the type of project inclusion typically approved by Commission staff. (See CCR §1769(a)(2).) As determined in the PTR, incorporation of these activities into the Project will not significantly impact the environment, will not alter the Project's conditions of certification, and will enable the Project to remain in compliance with LORS. (Table 1, Exhibit 0002.) The PTR's minimal Project alterations simply do not require or merit the scrutiny to which the Commission will subject the PTA, and a Commission decision on the PTR should not be delayed by combining it with the PTA. Project Owner respectfully requests that the Commission evaluate the PTR separately from the PTA and approve the actions in both petitions.

2. Parallel Consideration Of The PTR And The PTA Does Not Constitute “Piecemealing” Under CEQA.

Power of Vision's May 6, 2014 correspondence to the Commission proposed that the PTR changes were necessary components of the Project revisions in the PTA, thereby requiring the Commission to analyze them together as one Project amendment. (See CEC TN 202300, Table 1 Exhibit 0005.) Project Owner disagrees. The Project modifications in each document may be assessed independently. The CEQA Guidelines mandate that a “lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect.” CEQA Guidelines §15003(h). The Legislature designed this rule to prevent agencies from “chopping a large project into many little ones [“piecemealing”] – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.” *Bozung v. Local Agency Formation Comm.* (1975) 13 Cal.3d 263, 283-84.

Separate evaluation of these petitions by the Commission would not constitute piecemealing. Project Owner and the Commission have already thoroughly analyzed the Project's cumulative environmental impacts, including 3 FOST removals, in the Application for Certification and the Final Decision. In both the PTR and the PTA, Project Owner assessed the incremental environmental impact of the Additional FOST removals in light of the entire Project—the licensed CECP or redesigned version in the PTA, as applicable. [(See *Bozung* 13 Cal.3d 263, 283-84; *Citizens Assoc. for Sensible Development of Bishop Area v. County of Inyo et al.* (4th Dist. 1985) 172 Cal.App.3d 151, 166.] As previously mentioned, Project Owner determined that incorporating the Additional FOST removals would have an insignificant cumulative environmental impact on the Project, would comply with all LORS applicable to the Project, and would not require any revisions to the Conditions of Certification imposed in the Final Decision. (See PTR, Table 1 Exhibit 0002.) Project Owner reached a similar conclusion with respect to the PTA modifications.

The PTA considered the cumulative environmental impact of the Project amendments proposed therein in combination with the unchanged aspects of the licensed Project and the PTR actions. Project Owner's analysis determined that “all direct, indirect and cumulative impacts of the [amended] CECP on health, safety, and the environment will remain less than significant.... Impacts are actually reduced in many disciplines, and compliance with LORS is improved.” (PTA, Table 1 Exhibit 0003, page 1-6.) As the CEQA piecemealing rule is the only one that might have prevented separate consideration of the PTA and the PTR, and it is inapposite in this situation, Project Owner encourages the Committee to treat the PTR independently from the PTA.

IV. CONCLUSION.

The benefits to CECP of separate consideration of the PTR and the PTA far outweigh the detrimental impact of this approach. The actions in the PTR and the PTA are not necessarily sequential or related actions. The PTA is a modification of the power plant's design, while the PTR is merely a request to clear the project area of unnecessary, obsolete fixtures. The Additional FOSTs would need to be removed eventually, if not now, regardless of the Commission's decision on the PTA. Although the PTA operates on the assumption that the PTR actions will be taken, the PTA's objective is a power plant redesign, not removal of obsolete facilities nearby. The PTR actions can be taken regardless of the Commission's decision on the PTA, and the version of the power plant proposed in the PTA can be constructed without removal of FOSTs 1 and 2. Therefore, these petitions each stand on their individual merits and should be considered accordingly.

Removal of the Additional FOSTs duplicates the FOST removal process analyzed by the Application for Certification and mitigated by the conditions of certification imposed in the Final Decision. Project Owner's consultant assessed the environmental impacts of the removal of these three Additional FOSTs and concluded that when such removal is performed in conjunction with the applicable conditions of certification in the Final Decision, the cumulative environmental impact would be negligible and no additional conditions of certification would be necessary to account for the slightly expanded environmental impact attributable to such removal.

In each of the PTR and the PTA, Project Owner assessed the cumulative environmental impacts of the proposed project modifications in light of the overall Project, as applicable; thereby allowing the Commission to evaluate the cumulative environmental impact of each proposed change. Project Owner also determined the impacts of the proposed changes on Project LORS and conditions of certification. This analysis and its resulting conclusions remove any potential legal or practical barriers to separate consideration of each petition. Project Owner urges the Committee to consider the PTR and the PTA separately, and awaits the Committee's thoughtful decision on each one.

TABLE 1
EXHIBIT LIST
TO
CARLSBAD ENERGY CENTER LLC’S BRIEF IN FAVOR OF THE COMMISSION PROCESSING THE PETITION TO REMOVE SEPARATELY
FROM THE PETITION TO AMEND THE CARLSBAD ENERGY CENTER PROJECT (07-AFC-06C)

Exhibit No.	Transaction No.	Document Title	Topic(s)
Exhibit 0001	Publication No. CEC-800-2011-004-CMF	Carlsbad Energy Center Project Commission Decision dated June 2012	All
Exhibit 0002	TN 202267	Petition to Remove Obsolete Facilities to Support Construction of the Carlsbad Energy Center Project	All
Exhibit 0003	TN 202287-1, 202287-2, 202287-3,	Petition to Amend the Carlsbad Energy Center Project	All
Exhibit 0004	TN 202390	Letter Requesting Approval of the PTR Separately from the PTA	All
Exhibit 0005	TN 202300	Power of Vision’s May 6, 2014 Correspondence to the CEC	All
Exhibit 0006	TN 202623	Notice of Public Site Visit, Environmental Scoping Meeting and Committee Conference, Additional Committee Conference, and Committee Order for Briefs	All