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Organization:	Locke Lord, LLP
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Attorneys & Counselors

500 Capitol Mall, Suite 1800
Sacramento, CA 95814
Telephone: 916-930-2500
Fax: 916-930-2501
www.lockelord.com

John A. McKinsey
Direct Telephone: 916-930-2527
Direct Fax: 916-720-0443
jmckinsey@lockelord.com

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VIA E-FILING

Carlsbad Energy Center Project (07-AFC-06C)
Karen Douglas, Commissioner and Presiding Member
Andrew McAllister, Commissioner and Associate Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Re: **Carlsbad Energy Center Project Petition to Amend (07-AFC-06C)
Objection to California Energy Commission Data Requests 77-84**

Dear Committee Members and CEC Staff:

On October 2, 2014, the staff of California Energy Commission (the "CEC Staff") filed Data Request Set 3 ("DR Set 3") in the Carlsbad Energy Center Project ("CECP") proceeding. Pursuant to Title 20 CCR Sections 2025 and 1716, Carlsbad Energy Center LLC, project owner of the CECP ("Project Owner") herein partially objects to data requests 77 through 84 included in DR Set 3.

Underlying this objection document is a fundamental procedural issue that may require Committee attention. This issue is arising not just in the context of this objection and these CEC Staff data requests, but is also surfacing in the discovery and issues being raised by all parties to the proceeding. Accordingly, Project Owner believes that a Committee order that defines the scope of discover and evidence may be helpful if parties bring discovery issues to the Committee's attention.

Fundamental Issue and Background

When a Petition to Amend ("PTA") is filed for an approved Application for Certification ("AFC"), to what extent are issue areas and Conditions of Certification decided in the decision on the AFC re-opened or otherwise subject to discovery, argument, evidence and re-decision?

Relatedly, if the changes proposed in the PTA do not adversely impact an issue area, does any party to the PTA proceeding have the right or ability to conduct discovery on that topic or otherwise compel a re-decision of that issue area or Condition of Certification?

Project owner believes that a sound and correct policy in this regard would require that either the PTA make changes that adversely impact an issue area or that changed conditions have called into question the adequacy or suitability of the earlier decision on the AFC in that issue area.

This arises in the present instance regarding CEC Staff's data requests that relate to the possible, future I-5 widening and the visual resources characteristics of the project. The I-5 widening project was very thoroughly vetted and debated in the original AFC proceeding. The Final Decision contained several conditions that resolved the project's ability to conform to and otherwise not be adversely impacted by any I-5 widening project. In the Visual Resources issue area, Condition of Certification, Visual Resources-5 specified the procedure the project owner must follow if an when I-5 widening occurred adjacent to the project.

There was always a challenging topic underlying the I-5 widening project, namely that the California Department of Transportation ("Caltrans") would have to acquire, whether cooperatively or adversely through condemnation, any land from the project site that it wished to use for widening I-5 in the westerly direction. There were and are many different widening options and, even if a specific widening options was chosen, there would have remained basic questions about whether and how much land Caltrans would take from the project property to conduct the widening. Fortunately Staff and the Applicant reached an identical conclusion that the project could reasonably accommodate I-5 widening. Based on that testimony, the CEC approved the AFC with certain Conditions of Certification.

Now, it appears that several parties want to re-litigate the topic of I-5 widening, even though nothing has fundamentally changed in the I-5 plans nor does the PTA propose changes to the eastern borders of the project. For these reasons, Project Owner is concerned that allowing such discovery, inquiry and argument will essentially be re-opening a matter decided. It is for mostly for this reason that Project Owner is objecting to the subject data requests from CEC Staff.

Project Owner believes that, in part, parties are failing to distinguish between a new AFC and PTA to modify an AFC and are assuming that all issue areas and all topics are completely subject anew to discovery and argument and decision. In essence, that the entire project must be re-approved. That is not the case. Instead, the current proceeding only seeks approval of a PTA an AFC. Thus the basic question is whether the PTA should be approved, not whether CECP should be approved. Answering the PTA approval question requires deciding whether or not the PTA would cause the project to have an unmitigated significant impact or a compliance issue with a Law, Ordinance, Regulation or Standard ("LORS"). There is nothing the in the PTA that triggers concerns over visual resources related to I-5 and its possible future widening.

General Objections

CEC Staff data requests 77 through 84 ("Data Requests 77 to 84") in part relate to the landscaping and visual screening characteristics of the project along its eastern border. However, the PTA does not propose any changes that impact or affect that visual screening. In fact, the PTA reduces the visibility and the profile height of the project, making any screening already required that much more effective. Further, Caltrans has not changed the possible widening scenarios related to I-5 that arguably could impact visual screening. Thus, Data

Requests 77 to 84 seek information which is irrelevant and not reasonably necessary to reach a decision on the PTA.

Data Requests 77 to 84 also seek information that has already been specified to be provided as a compliance action. Data Requests 77 to 84 seek information that was never asked for nor required by CEC Staff in the process that led to the May 31, 2012 CECP Final Decision (the "Final Decision"). The Petition to Amend ("PTA") does not trigger a need to amend that Final Decision in the regard. Existing Conditions of Certification ("COCs"), specifically VIS-2 and VIS-5, address all issues presented in data requests 77 through 84. The text of such COCs is provided below.

1. VIS-2: Additional Perimeter Landscape Screening

The project owner shall provide landscaping that reduces the visibility of the power plant structures in accordance with local policies and ordinances and with findings and recommendations of Applicant Data Responses DR70-1, DR106 and DR107. Trees and other vegetation consisting of informal groupings of tall, fast-growing evergreen shrubs and trees shall be strategically placed along the eastern, western, and northern facility boundaries as called for in the above-referenced data responses, consistent with transmission line safety requirements. The objective shall be to create landscape screening of sufficient density and height to screen the power plant structures to the greatest feasible extent in the shortest feasible time; and to provide timely replacement for aging or diseased tree specimens on site in order to avoid future loss of existing visual screening. The design approach shall include both fast-growing tall shrubs to provide quick screening, and tall evergreen trees similar to those existing on site, to provide an ultimate overall canopy height comparable to that existing atop the CECP site earth berms.

In addition, the project owner shall, in coordination with the City of Carlsbad, prepare and submit supplemental, modified landscape plans to provide for replacement tree planting as needed, to the greatest feasible extent, in the future event of loss of existing tree screening due to City of Carlsbad sewer and/or lift station projects. Such supplemental landscape plans shall also provide the plan components described in items a through d, below, and be subject to the same verification procedures.

The project owner shall submit to the CPM for review and approval and simultaneously to the City of Carlsbad for review and comment a landscaping plan whose proper implementation will satisfy these requirements. The plan shall include:

- a. A detailed landscape, grading, and irrigation plan, at a reasonable scale. The plan shall demonstrate how the requirements stated above shall be met. The plan shall provide a detailed installation schedule demonstrating installation of as much of the landscaping as early in the construction process as is feasible in coordination with project construction;
- b. A list (prepared by a qualified professional arborist familiar with local growing conditions) of proposed species, specifying installation sizes, growth rates, expected time to maturity, expected size at five years and at maturity, spacing, number, availability, and a

discussion of the suitability of the plants for the site conditions and mitigation objectives, with the objective of providing the widest possible range of species from which to choose;

- c. Maintenance procedures, including any needed irrigation and a plan for routine annual or semi-annual debris removal for the life of the project;
- d. A procedure for monitoring for and replacement of unsuccessful plantings for the life of the project; and
- e. One set of 11"x17" color photo-simulations of the proposed landscaping at five years and 20 years after planting, as viewed from adjoining segments of I-5.

The plan shall not be implemented until the project owner receives final approval from the CPM.

2. VIS-5: Cumulative Impact Buffer Zone, Coordination with Caltrans, and Mitigation Plan

In order to address potential cumulative visual impacts resulting from I-5 widening, the Applicant shall maintain a permanent buffer zone, including the existing vegetative visual screening, on the eastern portion of the CECP site, between the existing NRG fence line and storage tank perimeter road. This measure shall be coordinated with Conditions of Certification LAND-1 and HAZ-8. The existing landscape screening within the buffer zone shall be maintained and enhanced per Condition of Certification VIS-2 after start of project construction. The buffer zone shall be kept available to maintain existing visual screening, accommodate future possible I-5 widening to the extent necessary, and to accommodate both future hazard protection features and visual screening.

In addition, the Applicant shall work with Caltrans to develop a Mitigation Plan for accommodating the widening project while maintaining visual screening of the CECP to acceptable levels. This plan could include complete or partial avoidance of the CECP site, complete or partial berm retention or replacement, complete or partial retention of existing landscape screening, and replacement screening as needed. The objective of the plan shall be to accommodate the I-5 widening within the designated buffer zone to the extent that encroachment is unavoidable, while providing needed hazard protection and acceptable levels of visual screening of the power plant.

If construction of a new landscaped berm west of the existing berm and proposed future Caltrans right-of-way is determined to be the most feasible measure to address potential cumulative impacts of the I-5 Widening Project, then design and construction of the new berm shall be implemented at the earliest feasible time, in order to maximize growing time for trees planted on the new berm. Landscaping of a replacement berm shall include installation of large-container (24-inch box or larger, as needed), fast-growing evergreen trees in sufficient density to provide comparable or better visual screening of the CECP site than currently exists, within the shortest feasible period. Trees shall be selected and located so as to achieve substantial screening within a period of five years from start of project operation.

The plan shall, at a minimum, include the following components:

- a. a record of discussions, meetings and planning activities conducted with Caltrans;
- b. the conclusions of these coordination activities;
- c. a detailed Mitigation Plan providing plans, elevations, cross-sections or other details, including a detailed list of plants and container size, sufficient to fully convey how the objectives of effective visual screening of the CECP are to be achieved; and
- d. a proposed construction schedule.

The Final Decision concludes that “impacts to visual resources caused by the project will be less than significant.” (Final Decision at p. 8.5-51 to -52) and that the COCs set forth in the Final Decision “will ensure that the project’s impacts to visual resources will be reduced to below the level of significance.” (Final Decision at p. 8.5-52.) Because the COCs adequately address all requested information, Project Owner objects to requests 77 through 84 in DR Set 3.

Specific Objections

DATA REQUEST 77: In order to better understand the extent of the impacts of the I-5 Widening Project Locally Preferred Alternative (LPA) on which impacts and mitigation measures for the amended CECP can be determined as appropriate, please provide the following Computer Aided Design (CAD) and image overlays:

- a. an accurately scaled and registered overlay of the Computer Aided Design (CAD) layout of the amended CECP site plan (PTA Figure 2.1-1) over the relevant portions of CAD layouts for the Caltrans I-5 Widening LPA (8+4 w/ Barrier Alternative).
- b. Please provide the above overlays in two forms: as CAD files (in Autocad file format) with separate layers for existing conditions with topography, proposed layouts, proposed grading; and as mapping in image file form.
- c. Please also provide both overlays (CAD and image) on rectified aerial photography for greater ease of public interpretation.

OBJECTION TO DATA REQUEST 77: Project Owner objects to this data request because it seeks information that is not necessary to reach a decision on the PTA.

Further, some of the information sought is not known at this time. Specifically, no specific I-5 widening project has been designed and publicized.

The data request is also fundamentally problematic because it presumes that a certain design of a widened I-5 has been completed and is also certain to occur at some date in the near future. While a widened I-5 is anticipated to occur at some time, the Final Decision on the currently-approved CECP already has COCs in place to ensure that the project accommodates the reasonably expected scope of changes to I-5. Further, the PTA does not propose any changes

relevant to those conditions. Thus this inquiry about I-5 detailed information seems not only incapable to being responded to, but also unnecessary to reach a decision on the PTA.

DATA REQUEST 78: Please provide schematic cross-sections showing the relationship of the existing I-5 and amended CECP features such as landscaped berm, access roads, and storage tanks.

OBJECTION TO DATA REQUEST 78: Project Owner objects to this data request because it seeks information that is not necessary to reach a decision on the PTA. Further, Project Owner objects to this data request because it seeks information already required by the Final Decision. Specifically, VIS-2 and VIS-5 require Project Owner to submit plans during compliance sufficient to show the amended CECP features and existing I-5.

DATA REQUEST 79: Please provide schematic cross-sections showing the relationship of the proposed I-5 Widening Project (LPA), with the proposed grading and project features of the amended CECP, including proposed concept(s) for implementation of **VIS-5**. Features depicted in the cross-sections should include the new proposed amended CECP fence line, proposed new Caltrans right-of-way (after I-5 Widening Project); all six GE LMS 100 generation units; proposed 230 and 138 kV transmission poles and gen-tie lines; and, the landscaped buffer as called for in **VIS-5**. In the schematic cross-sections, please provide dimensions such as width, grade elevation and height of the landscaped buffer, access roads, generation units, etc in order to sufficiently convey the layout concepts and design intent, particularly as they relate to implementation of visual screening as called for in **VIS-5**. Cross-sections should, at a minimum, illustrate conditions at amended CECP Units 6/7 and 8/9, with their associated re-configured 230kv gen-tie line transmission poles.

OBJECTION TO DATA REQUEST 79: Project Owner objects to this data request because it seeks information that is not necessary to reach a decision on the PTA.

Further, some of the information sought is not known at this time. Specifically, no specific I-5 widening project has been designed and publicized.

The data request is also fundamentally problematic because it presumes that a certain design of a widened I-5 has been completed and is also certain to occur at some date in the near future. While a widened I-5 is anticipated to occur at some time, the Final Decision on the currently-approved PTA already has COCs in place to ensure that the project accommodates the reasonably expected scope of changes to I-5. Further, the PTA does not propose any changes relevant to those conditions. Thus this inquiry about I-5 detailed information seems not only incapable to being responded to, but also unnecessary to reach a decision on the PTA.

DATA REQUEST 80: Please provide a scaled plan view conveying design intent for implementation of **VIS-5**.

RESPONSE TO DATA REQUEST 80: Project Owner objects to this data request because it seeks information that is not necessary to reach a decision on the PTA. Further, some of the information sought is not known at this time, because in accordance with COC VIS-5, it must be prepared and submitted as part of compliance with the final decision.

DATA REQUEST 81: Please prepare an updated arborist's assessment including inventory and recommendations for maintaining the existing level of visual screening on the western and northern borders of the EPS where the amended CECP would be constructed.

OBJECTION TO DATA REQUEST 81: Project Owner objects to this data request because it seeks information not necessary or useful to making a decision on the PTA.

The requested updated arborist's assessment was not required by CEC Staff or the Commission in reaching the Final Decision and nothing in the current PTA triggers a need to modify the decision. Existing COC VIS-2 addresses such concerns. The Amended CECP makes no changes to the project that impacts the project's ability to comply with this COC.

The data request also asks information that is not known at this time, and thus the information is not reasonably available to the Project Owner.

DATA REQUEST 82: Please prepare an updated conceptual landscape plan reflecting the recommendations of the arborist assessment for maintaining and enhancing visual screening at the amended CECP location in the near and medium term.

OBJECTION TO DATA REQUEST 82: Project Owner objects to this data request because it seeks information not necessary or useful to making a decision on the PTA.

The data request seems to assume that an original landscape concept plan was requested or provided in the original proceeding. However, a landscape concept plan was never considered necessary or useful in the original proceeding thus updating the plan is impossible. Further any landscape concept plan being provided as part of the data in the considering or the PTA would go against COC VIS-2 and the underlying finding of the Final Decision. Nothing in the PTA triggers a need to modify the decision or nor triggers an impact to the effectiveness of COC VIS-2.

The data request also asks information that is not known at this time, and thus the information is not reasonably available to the Project Owner.

DATA REQUEST 83: Please prepare simulations of the anticipated cumulative condition of the amended CECP following I-5 widening, as seen from KOP 2 (Pannonia) and KOP 4 (Hoover Street).

OBJECTION TO DATA REQUEST 83: Project Owner objects to this data request because it seeks information not necessary or useful to making a decision on the PTA.

Further, some of the information sought is not known at this time. Specifically, no specific I-5 widening project has been designed and publicized.

The data request is also fundamentally problematic because it presumes that a certain design of a widened I-5 has been completed and is also certain to occur at some date in the near future. While a widened I-5 is anticipated to occur at some time, the Final Decision on the currently-approved PTA already has COCs in place to ensure that the project accommodates the reasonably expected scope of changes to I-5. Further, the PTA does not propose any changes

relevant to those conditions. Thus this inquiry about I-5 detailed information seems not only incapable to being responded to, but also unnecessary to reach a decision on the PTA.

DATA REQUEST 84: Please provide conceptual plans and cross-sections of the amended CECP at its most easterly boundary, in relation to both the existing and expanded I-5 right-of-ways, in order to indicate the assumptions underlying the simulations.

OBJECTION TO DATA REQUEST 84: Project Owner objects to this data request because it seeks information not necessary or useful to making a decision on the PTA. The requested conceptual plans and cross sections were not required by the Commission to reach the Final Decision and nothing in the current PTA changes projects interaction with I-5.

Conclusion

Project Owner remains interested in any cooperative resolution to the issues associated with the above data requests and their objections and welcomes any dialogue that will work toward such a cooperative outcome. Further, Project Owner is confident that any remaining visual resource related decisions or issues have been appropriately set up for resolution during compliance. Project Owner will cooperate with CEC staff and all relevant agencies in following the Visual Resources COCs.

Locke Lord LLP



By: John McKinsey

Attorneys for Carlsbad Energy Center LLC