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STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:

DOCKET NO. 07-AFC-06C

Petitions to Amend The
CARLSBAD ENERGY CENTER PROJECT

CARLSBAD ENERGY CENTER LLC'S
RESPONSE TO ROBERT SARVEY'S MOTION TO
REQUIRE [SIC] THE FILING OF A NEW AFC

The Carlsbad Energy Center Project (the "CECP") is a power plant project that was licensed by the California Energy Commission ("CEC") when the project's Application for Certification ("AFC") was approved on May 31, 2012. In response to changed circumstances, Carlsbad Energy Center LLC ("Project Owner"), the owner of the CECP, filed a Petition to Remove on April 29, 2014, and a Petition to Amend on May 2, 2014 (collectively the "PTA"). The PTA seeks post-certification amendments to the CECP pursuant to Title 20, Section 1769 of the California Code of Regulations.

Intervenor Robert Sarvey, nearly a year after the PTA was filed, has moved to require Project Owner to file a new Application for Certification. In a motion filed on March 16, 2015 (the "AFC Motion"), Mr. Sarvey argues that the PTA proceeding should be converted to an AFC proceeding for the "sole purpose" of requiring the Project Owner to pay a substantial filing fee.¹ In a notice issued on March 20, 2015, the Hearing Adviser to the Carlsbad Amendment Committee (the "Committee") requested that the parties to the amendment proceeding file their responses to the AFC Motion by March 27, 2015. (TN-203930). Accordingly, for the reasons stated below, Project Owner respectfully requests that the Committee deny the AFC Motion.

I. The AFC Motion Is Outside the Scope of Mr. Sarvey's Intervention.

On October 6, 2014, Mr. Sarvey filed a Petition to Intervene in the proceedings to evaluate the PTA. (TN-203169). The Committee issued an Order granting intervenor status, but limited the scope of intervention to the topics of Air Quality, Greenhouse Gas Emissions, Public Health, and Alternatives. (TN-203296). Mr. Sarvey appealed the order to the full Commission. (TN-203342). The Commission held a hearing on the appeal on December 10, 2014, and subsequently issued an order affirming the Committee's Order. (TN-203433). The Commission noted that under Title 20, Section 1207(c) of the California Code of Regulations, "[i]ntervention is granted in the Committee's discretion to the degree that it finds intervention reasonable and relevant." (TN-203433, p. 1).

¹ "The sole purpose of the motion is to require Carlsbad Energy to provide the funding of the CEC analysis of the application 07-AFC-06C which is now being borne by the ratepayers." (TN-203893, p. 1).

On January 23, 2015, the Committee informed the parties that they could revisit the scope of their intervention at the February 4, 2015 Committee Status Conference by making a request in their status reports due January 30, 2015. (TN-203560). Mr. Sarvey filed a status report; however, he did not request that the Committee review of the scope of his intervention. (TN-203583). Though present by telephone at the February 4, 2015 Committee Status Conference, Mr. Sarvey did not make a request to expand the scope of his intervention then either. (*See* TN-203704). Accordingly, the scope of his intervention remains limited to the topics of Air Quality, Greenhouse Gases, Public Health, and Alternatives. (*See* TN-203958 denying Mr. Sarvey's closure plan motion as beyond the scope of his participation and instead considering it as public comment).

The sole purpose of the AFC Motion is to collect another AFC filing fee from the Project Owner to offset the costs of CEC Staff's analysis of the PTA. (TN-203893, p. 1). Since the AFC Motion is merely intended to collect additional funds from the Project Owner, it is not germane to the topics within Mr. Sarvey's scope of intervention. Project Owner therefore requests that the Committee deny the AFC Motion as beyond the scope of Mr. Sarvey's participation in the PTA proceeding and instead treat the AFC Motion as public comment.

II. The Motion Has No Basis in the Regulations That Govern the Siting Process.

Under Title 20, California Code of Regulations, Section 1708(c), when filing an AFC, the applicant must pay a filing fee and a per megawatt (MW) of generating capacity fee to the Energy Commission. (Cal. Code Regs., tit. 20 § 1708(c)). Those fees apply only to AFCs and are not a requirement of filing a post-certification petition to amend. As previously noted, Mr. Sarvey's stated "sole purpose" in moving for the filing of a new AFC is to allow the CEC to capture these fees. Noticeably absent from the AFC Motion, however, is any discussion of the regulations that govern the CEC's siting process. Mr. Sarvey does not point to any authority that justifies converting a petition to amend filed under Title 20, Section 1769 into an application for certification under Title 20, Section 1741, et. seq. nearly a year after the petition has been filed.

As justification for requiring a new AFC in this instance, Mr. Sarvey points to the fact that the San Diego Air Pollution Control District ("SDAPCD") required Project Owner to file a new Authority to Construct application because the amended project will use a different equipment package from the licensed project. While the SDAPCD permit evaluation shares some related aspects to the CEC's evaluation of the PTA, it is a separate process governed by different statutes and regulations. The SDAPCD's interpretation of its own process for evaluating air permit applications does not inform how the CEC should move forward in this proceeding. Nor does the SDAPCD process provide any authority for retroactively turning an amendment proceeding into a new certification proceeding before the CEC.

From the very first filings, this has been a post-certification amendment proceeding. Project Owner's PTA filings were made pursuant to the provisions of Title 20, Section 1769 and addressed the items that the regulation requires a post-certification amendment petition to contain. (TN-202267 & TN-202287-2). The CEC established the Carlsbad Amendment Committee to review the PTA. In the Committee's first notice, they laid out the procedures

under which the PTA would be evaluated by stating “[t]he Energy Commission has exclusive jurisdiction to license this project and is considering the amendment petitions under Title 20, California Code of Regulations, section 1769.” (TN-202623, p. 2). When the CEC solicited outside agency participation in this proceeding, it was for input during the amendment review period. (TN-202717). The CEC Staff’s notices of receipt for the petition to remove and the petition to amend indicated that the review process would be pursuant to the procedures set forth in Title 20, Section 1769. (TN-202392, p. 1; TN-202415, p. 1). Even the intervenors have approached this as an amendment proceeding since the early stages of review of the PTA.² This is an amendment proceeding to evaluate a petition to amend an existing license.

Mr. Sarvey fails to cite any authority for the result he seeks. Because this process has been governed by the procedures for post-certification amendment from the first filings, and because the Project Owner seeks to amend an existing license, the AFC Motion should be denied.

III. Mr. Sarvey is Wrong in His Assertion that Granting the Motion Does Not Impact the Underlying Proceeding.

Mr. Sarvey’s motion suggests that the underlying proceeding would not be changed in any way if the motion is granted.³ Presumably, the inference to be drawn is that the project owner would file an AFC, pay the filing fee, and then this proceeding would move forward as scheduled to Evidentiary Hearings with the expectation that the Presiding Member’s Proposed Decision would follow shortly thereafter.

However, granting the AFC Motion would take this proceeding from a posture of near-completeness back to the beginning because the filing of an AFC is an event of significance that sets into motion numerous requirements and deadlines. Many of the regulations that govern the CEC siting process are specifically linked to the filing of an AFC.⁴ Once the AFC is filed, procedurally, those regulations need to be followed. The CEC, the Committee, the CEC Staff, and the parties would then be required to take a number of actions that have already been taken both in the original proceeding and during consideration of the PTA.⁵ In essence, the filing of an AFC presses the reset button. Clearly, despite Mr. Sarvey’s assertion to the contrary, the AFC Motion will have a significant impact on the underlying proceeding if granted.

² For example, intervenor Power of Vision opposed Project Owner’s request to begin preparing for tank demolition under the current license because the project was under review in an amendment proceeding. (TN-202450). As another example, intervenor Robert Simpson argued that the Committee had improperly limited the scope of his intervention because he had been an intervenor in the original AFC proceeding and that this was an amendment proceeding to the AFC. (TN-203385, pp. 9 – 10).

³ “Intervenor does not request any change in the underlying proceeding in any way.” (TN-203893, p. 1).

⁴ Title 20, Section 1748 of the California Code of Regulations, for example, mandates that evidentiary hearings be held no earlier than 90 days after the acceptance of an application for certification.

⁵ As noted at the Site Informational Meeting on August 7, 2014, the evaluation of the CECP PTA would generally follow the AFC process, including schedule and public participation. (TN-202898). The evaluation of the CECP PTA has followed this process and, with the addition of public participation Committee Conferences, has institutional additional public participation and review.

Conclusion

The AFC Motion is outside the scope of Mr. Sarvey's intervention and is not supported by authority. The CEC has been over-seeing an amendment proceeding since the Project Owner filed the PTA nearly a year ago pursuant to Title 20, Section 1769 of the California Code of Regulations. If the AFC Motion is granted, there would be significant impacts on the underlying proceeding. The evaluation of the proposed changes would be taken from a posture of near-completeness back to the beginning to satisfy the regulations that govern the siting process. Accordingly, Project Owner requests that the Committee deny the AFC Motion.