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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of: Petition to Remove Obsolete Facilities To Support Construction of the Carlsbad Energy Center And Petition to Amend the Carlsbad Energy Center Project	))))))))	Docket No. 07-AFC-06C

BRIEF OF ROBERT SIMPSON

Robert Simpson submits this brief on the following topics previously discussed and/or identified by the Commission in its Notice of Briefing Deadline and Issues Identified for Briefing (TN # 204058) as "issues of interest" in this proceeding:

- Air Quality/Greenhouse Gases: Federal NSPS
- Coastal Dependency
- Financial Assurances for Post-Closure Site Remediation

Air Quality/Greenhouse Gases: Federal NSPS

As discussed in Mr. Simpson's comments on the PSA (TN # 203588), he takes issue with the relationship between the Carlsbad Energy Center Project (CECP) and the proposed New Source Performance Standards (NSPS) for greenhouse gas emissions for new electric power plants from the Environmental Protection Agency (Federal Register, Volume 79. No. 5; submitted as TN # 203926, exhibit # 500). While recognizing that the NSPS standards in question have yet to be finalized[1] and that the CECP likely would not qualify as subject to those standards since its listed 30.8% potential electric output falls short of the 33% threshold, Mr.

[1] The EPA anticipates that the proposed NSPS rules will be finalized during the summer of 2015, at which time those rules will go into effect. *See* http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates.

Simpson is nevertheless concerned that the CECP's greenhouse gas emissions, carbon dioxide in particular, will likely exceed the amount allowable under those same NSPS standards and the Commission appears indifferent or even apathetic about this fact.

According to the new NSPS standards, "large natural gas-fired stationary combustion turbines" may emit no more than 1,000 lbs. of CO2 per MWh and "small natural gas-fired stationary combustion turbines no more than 1,100 lbs. of CO2 per MWh."[2] A "large natural gas-fired stationary combustion turbine" is defined as one with heat input ratings greater than 850 MMBtu/h while a "small" one is less than that number.[3] The CECP turbines all have heat ratings of 984 MMBtu/h,[4] therefore the CECP would fit neatly into the "large" category, thereby limiting its CO2 emissions to 1,000 lbs. CO2/MWh if it were subject to the NSPS.

The FSA lists the CECP's "Expected CO2 Emissions Performance" as 0.5026 Metric Tonnes of CO2/MWh.[5] Converting metric tonnes to pounds, where one metric tonne equals 2,204.6 lbs., we find that the CECP's CO2 emissions output is 1,108 lbs. CO2/MWh, a number that would violate the NSPS' 1,000 lbs. CO2/MWh standard for the CECP's type of generating unit by nearly *eleven percent*. Indeed, the FSA itself notes that the CECP would exceed the standard when it states "The estimated operating gross and net efficiency for the gas turbines, not including the other emissions sources at the site that are shown in the table above, *is expected to just be above these values* [of 0.500 MTCO2/MWh and 0.454 MTCO2 per MWh gross] (approximately 0.503 MTCO2/MWh net, and 0.486 MTCO2/MWh gross – LL 2014nn)."[6] As such, there is no question that the CECP will emit CO2 at a rate in excess of the proposed NSPS standards.

These excessive CO2 emissions are all the more disconcerting given that the FSA repeatedly asserts that CECP will operate at rates substantially lower than the listed 30.8% electric output, but it nevertheless notes that "real performance may be somewhat better *or worse*

[2] FSA, Air Quality Appendix, p. AQ1-9.
[3] *Id.*
[4] *Id.*, Conditions of Certification, pages 7-14 – 7-15.
[5] *Id.*, Air Quality Appendix, Greenhouse Gas Table 3, p. AQ1-12.
[6] *Id.*, FSA, Air Quality Appendix, p. AQ1-13.

than this depending on actual operating conditions."[7] Indeed, during the evidentiary hearings, Staff noted that CECP would operate nowhere near the 30.8% output:

> **Mr. Walters**: [30.8% is] the absolute maximum permit[ted]. I wouldn't expect it to get anywhere near there. Probably 10, 15 percent on a really, really heavy year based on other projects and rather critical review of key data that's been available for the last ten years.[8]

Yet, despite operating nowhere near the maximum permitted output, the CECP is still expected to emit 1,108 lbs. CO2/MWh, an amount calculated by the Staff and in excess of the proposed NSPS threshold for power plants with a greater output than this one.

While the Project Owner and Commission have both asserted that the proposed NSPS rules do not apply to CECP, they have made no showing of concern about the actual emissions coming from this project, instead choosing to use the CECP's failure to exceed the 33% capacity factor threshold as an excuse to ignore those emissions altogether. Those 1,108 lbs. of CO2/MWh should have given the Commission and Project Owner pause regardless of the applicability of the federal standards. Moreover, considering that the CEC, the California Public Utilities Commission, the air districts, and the State of California are supposedly committed to reducing greenhouse gas emissions under the auspices of AB 32, and for the sake of the citizens of Carlsbad and California, reducing the CO2 emissions of the CECP should be a top priority. In this case, the prioritization should be even greater since, by the Staff's own admission, the CECP is intended to replace the zero-GHG emission nuclear plant formerly operating at San Onofre.[9] A condition should be added to this project requiring that CO2 emissions not exceed the 1,000 lbs. CO2/MWh NSPS threshold, whether through reduced operation or the addition of mitigation measures. By recognizing that the expected CO2 emissions of the CECP are excessive despite the apparent inapplicability of the NSPS, the Commission would send a clear message that this and future projects should make every effort to reduce their carbon footprints.

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[7] *Id.*

[8] TN # 204131, Transcript of April 2, 2015 Evidentiary Hearing, p. 131 lines 14-18.

[9] *Id.* at p. 135 lines 11-18: "MR. ZIZMOR: …What [was] the reasoning why [the CPUC] needed to approve the 500 – 800 [MW]? MR. VIDAVER: The 500, 800 megawatts were intended to provide for local and Southern California reliability given the loss of the San Onofre Nuclear Station."

Coastal Dependency

The Commission has failed to obtain a report from the California Coastal Commission and to consider that report prior to overriding it. When a power plant is proposed to be located in the coastal zone, the law requires that the California Coastal Commission ("CCC") prepare a report and submit it to the Energy Commission for its consideration. Under Public Resources Code §25519(d), if the site of a proposed gas-fired power plant is proposed to be located in the coastal zone then the Energy Commission *must* transmit a copy to the CCC for its review and comments. As stated in the FSA, the "amended CECP site is located within the Coastal Zone in the city of Carlsbad" and "is within the retained jurisdiction of the Coastal Commission."[10] The CCC has not submitted a report or comments in this proceeding as required.

Without a report from the CCC, the Energy Commission does not have the opportunity to even review it when making its proposed and final decisions in this proceeding. In the case of a power plant to be located on a site in the coastal zone, the Energy Commission must include specific provisions to meet the objectives of the Coastal Act as may be specified in a report submitted by the CCC (Public Resources Code §25523(b)). In this case, no report was submitted or reviewed.

Instead, the Energy Commission relied on its own staff for its opinions "that the amended CECP would be consistent with the Coastal Act."[11] In this regard the Energy Commission failed to proceed in the manner required by law. The law requires the Energy Commission to include specific revisions of the report submitted by the Coastal Commission to ensure that the objectives of the California Coastal Act are met (Public Resources Code §25523(b)). Instead of proceeding as required by law, the Energy Commission made the determination on its own. This did not cure the failure.

The Energy Commission did not follow the California Coastal Act. A comprehensive report prepared and submitted by the Coastal Commission is a necessary predicate for a final decision by the Energy Commission. To date, it has not obtained this report and has simply decided to resolve any coastal issues on its own. The problem with this approach is that the

[10] FSA, Land Use, page 4.6-13.
[11] *Id.*, Land Use, page 4.6-14.

Energy Commission does not have evidence to support its resolutions to any issues involving the Coastal Act since the best evidence would be a report prepared by the CCC. Indeed, the only report from the CCC available to the Energy Commission regarding the Carlsbad site dates back to 1990 and that report found that a power plant at this same location was inconsistent with the Coastal Act.[12] The Energy Commission at least discussed that 1990 report in its original decision on the combined cycle project; it has not even done so much as mention it in this amended proceeding.

The FSA attempts to discuss the CECP's consistency with the California Coastal Act. It concludes that the 2012 Commission Decision "reached a finding that the original CECP was consistent with the Coastal Act" and that since the Commission responded to intervenors' concerns of inconsistency with the Coast Act by lowering the profile of the amended CECP, "the amended CECP would be consistent with the Coastal Act."[13] However, the 2012 Commission Decision never relied on a report from the CCC in the first place, leaving that defect uncured here. The Energy Commission merely reached the same conclusion it did previously without the required report from the CCC.

The Coastal Commission should participate in this proceeding and provide a written report on the suitability of the proposed site. Under Public Resources Code §30413(d), the Coastal Commission has a mandatory, non-delegable duty to prepare a report for the Energy Commission's consideration. Since the Coastal Commission has not prepared or submitted the required report for the Energy Commission's consideration, the amended CECP proceedings are incomplete and the requested license should be denied until the required report is submitted and studied.

Public Resources Code §30413(d) requires the Coastal Commission to provide a formal report in these proceedings. With respect to the responsibilities of the CCC in relation to the exercise of jurisdiction by the Energy Commission in the coastal zone, Public Resources Code §30413(d) states:

> "Whenever the State Energy Resources Conservation and Development Commission exercises its siting authority and undertakes proceedings pursuant to the provisions of

[12] TN # 66185, Commission Decision, Land Use, page 8.1-6 (July 11, 2012).
[13] FSA, Land Use, page 4.6-14.

Chapter 6 (commencing with Section 25500) of Division 15 with respect to any thermal powerplant [sic] or transmission line to be located, in whole or in part, within the coastal zone*, the [Coastal Commission]* ***shall*** *participate in those proceedings* and shall receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed site and related facilities specified in that notice. The commission's report shall contain a consideration of, and findings regarding, all of the following:

> (1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.
>
> (2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.
>
> (3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.
>
> (4) The potential adverse environmental effects on fish and wildlife and their habitats.
>
> (5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.
>
> (6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.
>
> (7) Such other matters as the commission deems appropriate and necessary to carry out this division."

(emphasis added).

When the California Legislature used the word "shall" in this section, it expressed the intent that the Coastal Commission participate in these proceedings and file the report containing the seven findings set forth above. The Legislature's use of the word "shall" mandates action, as opposed to the word "may," which permits but does not require it. In §30413, the difference is

made clear by the distinction between the language used in subdivision (d) which uses the mandatory "shall," as compared to subdivision (e) which uses the discretionary "may."[14]

Despite these requirements, the Coastal Commission did not file the report mandated by §30413(d). In the original proceeding, Charles Lester, Executive Director of the CCC submitted a letter (docketed as TN # 62383) stating that, because of substantial workload and limited resources due to budget constraints, the Coastal Commission was unable to complete a §30413(d) report. Presumably, the same excuse applies here, although we would never know it since no similar letter has been filed in this proceeding. Nevertheless, the fact remains that while the Coastal Commission may be facing significant budget constraints, this does not excuse it from performing its mandatory non-delegable duty to file such a report as a part of the CECP review process. The report is a pre-requisite to the Energy Commission's analysis of the impacts of the CECP. If it is a question of money, the Project Owner should have been required to provide the funding necessary for the Coastal Commission to fulfill its statutory obligation to prepare the required report.

Moreover, in Mr. Lester's letter in the original proceeding, he additionally noted that the CCC could not submit a report because "we are already past the stage in this particular review when it would be appropriate to submit the requested report. …[W]e are to submit the report before the CEC publishes the Presiding Member's Proposed Decision…." This line of reasoning does not apply to the amended CECP as the PMPD has yet to be published. The CCC still has time to submit its required report.

The Legislature intended the protection of coastal resources to be fully considered and ensured in the Energy Commission's approval of power plants. Section 30413(d) would be completely meaningless if that were not the case. In order to comply with the law, a report from the Coastal Commission must be filed with the Energy Commission before it proceeds with publishing the PMPD.

[14] 30413(e) reads: "The commission ***may***, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority." (emphasis added).

Financial Assurances for Post-Closure Site Remediation

In the original CECP proceeding, Mr. Simpson recommended that the Project Owner set aside money annually to fund the demolition of the CECP at the end of its useful life. The Commission considered these comments in its Final Decision and, though rejecting the idea of funding site remediation in that instance, agreed that "the policy question raised by Mr. Simpson's request is worthy of further study."[15] It is not clear whether the Commission conducted any further study and the issue is not discussed at all in the FSA here, but following a motion by Intervenor Robert Sarvey requesting similar site remediation language for the amended CECP (TN # 203923), the Commission asked that parties brief the issue.

Simply put, California has numerous retired energy projects that have not been dismantled. As Mr. Sarvey noted in his motion, abandoned power plants litter the California landscape from Mariposa to Rancho Seco to San Onofre to Morro Bay.[16] Indeed, the city of Carlsbad would be saddled with the Encina power plant upon its scheduled closure in 2017 had not the Project Owner agreed to cover the costs of demolition as part of this project. As such, once a power plant reaches the end of its useful life, it appears that the only available options are to let the outdated, inoperable, abandoned plant sit idly behind a chain link fence, or require the new land owners or tenants to pay substantial amounts of money to demolish it themselves.

This is patently unfair to the community. Since remediation costs are prohibitive for the public, power plants end up sitting unused once they close. Leaving a useless power plant to crumble deprives the community of the opportunity to rehabilitate the property for something more useful while simultaneously blighting the landscape and making the surrounding property less desirable. Similarly, leaving demolition up to future land owners or tenants forces the community into a situation where the property invariably ends up getting reused as a power plant (or other industrial use) since only similar industries will have the financial will and wherewithal to clean the site. Given these two choices, cities end up with no choice at all – they have little leverage and get pushed into siting a similar land use since that is preferable to a crumbling

[15] TN # 66185, Commission Decision, Compliance/Closure, page 4-2.
[16] TN # 203923, Robert Sarvey's Motion to Require the Applicant to Set Aside Funding for Demolition of the Amended Carlsbad Energy Center, pages 2-3.

liability. The community is then, in effect, held hostage by previous generations who approved the land use decades prior. With funding to remediate the site following closure, however, cities would then have a legitimate, unencumbered opportunity to choose between siting a new power plant where the old one once sat, and changing the land use entirely based on the input and desires of the current community.

The lack of site remediation also hurts potential new owners or tenants. Why should a new owner or tenant be forced to pay for the demolition and cleanup of something with which it had no previous involvement? In the case of the CECP, as part of its agreement to build its project, NRG had to agree to also demolish the Encina plant. In all the decades of Encina's operation, not once did NRG help build a single structure or pollute the property. However, since there is no mechanism funding site remediation, they have been forced into a situation where they must demolish and clean the site if they want to construct their own power plant. They are backed into a corner just as the community is. By providing funding for site remediation over the course of the plant's lifetime, future users of the land will not have to worry about the sins of the previous users.

Therefore, the Commission should require a provision that demands that funds be set aside for decommissioning and site remediation. This and future decisions should include a condition stating:

> After the Project Owner commences operation, the Project Owner will set aside $3,000,000 every year on the anniversary of the commercial operation date, until it can demonstrate that adequate funds are available, in order to fund the demolition of the project and remediation of the property.

If the Commission is unwilling to add this language to the CECP, but still considers this "worthy of further study," the Commission should immediately begin studying this subject rather than kicking it down the road for another discussion in briefs such as this one.

Respectfully Submitted,

/s/ David Zizmor – Attorney for Robert Simpson

April 24, 2015