

## DOCKETED

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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 SIMPSON'S MOTION**  
**TO REQUIRE THE FILING OF A NEW PETITION TO AMEND**

On April 14, 2015, Intervenor Robert Simpson filed his Motion To (A) Require The Project Owner [sic] To Submit A Petition To Modify Its Application For Certification And (B) Delay The Issuance Of A Proposed Decision In This Proceeding Until The Commission Has Fully Examined The Petition To Modify (the "Motion"). The Motion requests that the Carlsbad Amendment Committee (the "Committee") require the Carlsbad Energy Center LLP ("Project Owner") to file a new petition to amend the Carlsbad Energy Center Project ("CECP").<sup>1</sup> Mr. Simpson argues that a new petition to amend is necessary because it is likely that the California Public Utilities Commission ("CPUC"), in their review of an Application for Authority to Enter into a Power Purchase Tolling Agreement ("PPTA"), will not authorize San Diego Gas & Electric Company ("SDG&E") to procure the full amount of generating capacity from the CECP.

Project Owner opposes the Motion because: (1) it is outside the scope of Mr. Simpson's intervention; (2) it relies on uncertain regulatory action and mischaracterizes the record in the CPUC proceeding; and (3) Project Owner has not proposed changing the project under CEC review. Project Owner respectfully requests that the Committee deny the Motion.

**I. Project Alternatives Are Outside the Scope of Mr. Simpson's Intervention.**

On August 7, 2014, Mr. Simpson filed a Petition to Intervene in the proceedings to evaluate the Project Owner's Petition To Amend ("PTA") the CECP. (TN-202888.) The Committee issued an Order granting intervenor status, but limited the scope of intervention to the topics of Air Quality, Greenhouse Gas Emissions, and Public Health. (TN-203091.) Mr. Simpson appealed the order to the full Commission. (TN-203166.) The Commission held a hearing on the appeal on October 29, 2014, and subsequently affirmed the Committee's Order. (TN-203272.)

On January 23, 2015, the Committee informed all parties that, if they made a request in the next status report, they could revisit the scope of their intervention at the February 4, 2015 Committee

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<sup>1</sup> Mr. Simpson asks that Project Owner be required to submit a "petition to modify" pursuant to the provisions of Title 20, Section 1769 of the California Code of Regulations. (TN-204185, p. 4.) Section 1769 provides the procedure for post-certification amendments to CEC-licensed power plant projects. (20 Cal. Code Regs. § 1769(a).)

Status Conference. (TN-203560.) Mr. Simpson did not file a status report nor did he appear at the February 4, 2015 Committee Status Conference. (TN-203704, p. 10, lines 4-13.) Mr. Simpson's intervention remains limited, as it has throughout the course of the PTA proceeding, to the topics of Air Quality, Greenhouse Gases, and Public Health. In other topic areas, though he remains free to make public comments, Mr. Simpson is not an intervenor.

Mr. Simpson's Motion seeks to require Project Owner to file a new petition to amend for the purpose of licensing an alternative CECP facility with a reduced generating capacity.<sup>2</sup> (TN-204185, p. 3-4.) The Motion concerns a Project Alternative. It is outside the scope of Mr. Simpson's intervention. Mr. Simpson should not be allowed to circumvent the carefully considered limits on his participation as an intervenor by filing a motion outside the scope of his intervention. (*See, e.g.* TN-203958, p. 2, denying a motion filed by another intervenor in this matter because it was outside the scope of his intervention.) Project Owner requests that the Committee deny the Motion as beyond the scope of Mr. Simpson's intervention in the PTA proceeding and instead treat the Motion as public comment.

## **II. Mr. Simpson Relies on Uncertain Regulatory Action and Mischaracterizes the Record of the CPUC Proceeding.**

Mr. Simpson's argument appears to be that a petition to amend is necessary because: (1) it is unlikely that CPUC will authorize SDG&E to enter into a procurement contract with Project Owner for the full generating capacity of the CECP; and (2) he believes Project Owner, in the CPUC proceeding, has proposed building an alternative project with reduced generating capacity. In making his argument, Mr. Simpson relies upon uncertain regulatory action and mischaracterizes the record of the CPUC proceeding.

### *A. Uncertain Regulatory Action By CPUC Is Not a Basis to Require a New Petition to Amend Before the CEC.*

To support the Motion, Mr. Simpson cites to two proposed decisions in the CPUC proceeding evaluating SDG&E's application for authority to enter into a PPTA with Project Owner. The first proposed decision, issued by Administrative Law Judge Yacknin ("ALJ Yacknin"), would deny the application. The second proposed decision, issued by Commissioner Picker, would authorize a reduced contract capacity of 500 MW. Neither represents a final decision on the application to enter into a PPTA. Uncertain regulatory action before CPUC is not a proper basis for requiring the Project Owner to file a new petition to amend with the CEC.<sup>3</sup>

The CPUC proceeding and the CEC proceeding are separate processes considering distinct issues before different agencies.<sup>4</sup> Though the proceedings share related aspects, they are entirely independent of one another. The CEC has the exclusive power to certify the type of thermal

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<sup>2</sup> As will be discussed in Part II of this response, the reasoning in Mr. Simpson's Motion is based on mischaracterizations of the record in the CPUC proceeding and uncertain regulatory action.

<sup>3</sup> A post-certification petition to amend is required if a project owner proposes a modification of project design, operation, or performance requirements. (20 Cal. Code Regs § 1769.)

<sup>4</sup> CPUC is considering SDG&E's application to enter into a PPTA with Project Owner to procure electricity. CEC is considering Project Owner's petition to construct six LMS100 generating units and remove an existing power plant.

power plant proposed by Project Owner. (Pub. Resources Code § 25500, *see also* Pub. Resources Code §§ 25110, 25119, 25120.) CEC licensing is not tied to whether a project has obtained, or could obtain, a particular utility contract. (*See* Pub. Resources Code § 25523 and 20 Cal. Code Regs. § 1752 for the factors that must be considered during the licensing process.) Neither proposed decision constrains the authority of the CEC to certify the project as proposed in the PTA. Even a final CPUC decision denying SDG&E’s application would not constrain the CEC’s authority to certify the six LMS100 unit project that Project Owner seeks to build. Therefore, Project Owner should not be required to file a new petition to amend simply because CPUC might authorize less procurement than SDG&E seeks in its application.

*B. Mr. Simpson Mischaracterizes the Record of the CPUC Proceeding By Suggesting that Project Owner Has Proposed Building a Facility With a Reduced Generating Capacity.*

Mr. Simpson mischaracterizes comments on ALJ Yacknin’s proposed decision made by Project Owner in the CPUC proceeding. Through selective quotation, Mr. Simpson suggests that Project Owner has, in the CPUC proceeding, proposed building an alternative project with a reduced generating capacity. This is not an accurate reflection of Project Owner’s comments or position.

Mr. Simpson argues that Project Owner has proposed “an alternative to the 632 MW project currently under consideration both at the CPUC and [CEC]. . .” (TN-204185, p. 2.) As proof, Mr. Simpson provides the following excerpt from Project Owner’s comments on ALJ Yacknin’s proposed decision:

[t]he [CPUC] could approve the Application and simultaneously require modification of the PPTA to apply to five generating units of the Carlsbad Energy Center as proposed to meet 500 MW of LCR need... If the Commission were to approve this approach in a decision adopted not later than May 2015, Carlsbad Energy would agree to modify the PPTA to apply to the output of five units as proposed on the same price terms and according to the schedule set forth in the current PPTA.

(TN-204185, p. 2 (quoting *Opening Comments of Carlsbad Energy Center LLC on the Proposed Decision of Administrative Law Judge Yacknin*, March 20, 2015, at pp. 12-13).)

In stating that this is an alternative to the project under consideration by the CEC, and then providing the above quotation, Mr. Simpson seems to be suggesting that Project Owner has proposed building a project with a reduced capacity of 500 MW.<sup>5</sup>

However, when the full quotation is provided, it is clear that the Project Owner’s proposal relied upon building the project described in the PTA:

The [CPUC] could approve the Application and simultaneously require modification of the PPTA to apply to five generating units of the Carlsbad Energy Center as proposed to meet 500 MW of LCR need, **with the sixth unit to be included automatically under the PPTA if and when SDG&E determines**

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<sup>5</sup> Mr. Simpson assumes that a reduction in the amount SDG&E can procure under the PPTA will result in a reduction in the CECP’s built generating capacity. (TN-204185, p. 3.)

**that the RFO will not produce more than 200 MW of feasibly available and cost effective preferred resources and energy storage capable of meeting reliability needs.**

If the [CPUC] were to approve this approach in a decision adopted not later than May 2015, Carlsbad Energy would agree to modify the PPTA to apply to the output of five units as proposed on the same price terms and according to the schedule set forth in the current PPTA. **Carlsbad Energy would agree up front to incorporate the sixth unit under the PPTA automatically following timely confirmation from SDG&E that the sixth unit should be included.**

(TN-203986, p. 13, emphasis added.)

There is a significant difference between the way Mr. Simpson characterizes the proposal made in the opening comments and what Project Owner actually proposed.<sup>6</sup> Despite Mr. Simpson's statement to the contrary (TN-204185, p. 2), Project Owner did not propose an alternative to the project under CEC review. Project Owner's actual proposal requested that, if CPUC will not authorize SDG&E to procure the full output of the CECP, a modified PPTA be approved that would initially authorize 500 megawatts of procurement from five of the six LMS100 units with the potential to subsequently add the sixth unit to the contract under certain conditions. (TN-203986, p. 13.) Project Owner has not proposed building anything less than the six LMS100 units proposed in the PTA. If CPUC does not authorize the inclusion of the sixth unit in SDG&E's procurement contract, there are other commercial opportunities that Project Owner sees for that unit, including a separate power purchase agreement or operation as a merchant generating unit. In short, Mr. Simpson's characterization of Project Owner's proposal does not reflect the actual proposal. The project design remains the same project design under review by the CEC.

*C. Mr. Simpson Further Mischaracterized the Record of the CPUC Proceeding By Stating That Project Owner Testified That Reducing the PPTA from 600 MW to 500 MW Would Require a PTA Before the CEC.*

Mr. Simpson further mischaracterized the record of the CPUC proceeding in arguing that Project Owner should be required to submit a new amendment petition under Title 20, California Code of Regulations, section 1769. Mr. Simpson stated that "the Project Owner has admitted in testimony at the CPUC that modifying the PPTA from 600 MW to 500 MW would require modifying their petition to amend here at the California Energy Commission..." (TN-204185, p. 4, emphasis omitted.) The testimony he cites to, however, rebuts an Alternatives proposal made by Pio Pico Energy Center LLC that would eliminate one of the CECP's six LMS100 units and instead build an additional LMS100 unit adjacent to the Pio Pico Energy Center. (TN-204186, p. 2.) It does not speak to the impacts of a reduced contract capacity taken alone. There is a notable difference between the ultimate effects of CPUC approval of a reduced contract capacity and the

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<sup>6</sup> The CPUC proceeding and the CEC proceeding are separate processes considering distinct issues. CPUC's review of SDG&E's application to enter into a PPTA is irrelevant to this proceeding. However, because Mr. Simpson has made the CPUC proceeding the basis of his motion, Project Owner feels it necessary to discuss the significant difference between Mr. Simpson's characterization of Project Owner's proposal to CPUC and the actual proposal.

ultimate effects of a project redesign proposed by the owner of a competing energy center. By conflating the two, Mr. Simpson mischaracterizes the testimony provided before the CPUC.

### **III. A New Petition to Amend is Unnecessary Because the Project Under CEC Review Has Not Changed.**

The relief sought by Mr. Simpson is that the Committee require Project Owner to file a petition to modify pursuant to Title 20, Section 1769 of the California Code of Regulations. The regulation cited by Mr. Simpson provides “[a]fter the final decision is effective under section 1720.4, the applicant shall file with the commission a petition for any modifications it proposes to the project design, operation, or performance requirements.” (20 Cal. Code Regs. § 1769(a)(1).) As previously discussed, Mr. Simpson states, without proper support, that the Project Owner has proposed an alternative to the project currently under consideration by the CEC. Relying on mischaracterizations of the record in the CPUC proceeding, he suggests that the ultimate project will be one with a reduced generating capacity. (TN-204185, at p. 3.) His conclusion, though he cannot point to any actual instance in which Project Owner has proposed modifying the project, is that an amendment is necessary.


Project Owner has not proposed any new modifications to the project design, operation, or performance requirements of the CECP. As indicated at the Evidentiary Hearings on April 2, 2015, Project Owner is not changing its desire to permit the six LMS100 unit project. (TN-204131, pp. 158-161.) The ultimate outcome of CPUC proceeding evaluating SDG&E’s application is irrelevant to the generating capacity that Project Owner seeks authority to construct. Because Project Owner has not proposed any new modifications to the CECP, another petition to amend is not necessary. Mr. Simpson’s motion should be denied.

### **Conclusion**

Mr. Simpson’s Motion addresses a Project Alternative and is therefore outside the scope of his intervention in this proceeding. Even if his Motion is considered to be within the scope of his intervention, it relies upon uncertain regulatory action by another agency and supports its arguments through mischaracterizations of the record of the CPUC proceeding. Mr. Simpson has not identified any change proposed by the Project Owner that would require the filing of a new post-certification amendment petition pursuant to Title 20, Section 1769 of the California Code of Regulations. Project Owner respectfully requests that the Motion be denied.

Dated: April 29, 2015

Locke Lord LLP

By:   
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