

DOCKETED

Docket Number:	07-AFC-06C
Project Title:	Carlsbad Energy Center - Compliance
TN #:	205287
Document Title:	Project Owner's Response to Intervenor's Pending Motions and Response to Intervenor's Preliminary Comments on the PMPD
Description:	N/A
Filer:	Dee Hutchinson
Organization:	Locke Lord LLP
Submitter Role:	Applicant Representative
Submission Date:	7/8/2015 4:46:31 PM
Docketed Date:	7/8/2015

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 INTERVENOR'S PENDING MOTIONS AND RESPONSE TO
INTERVENOR'S PRELIMINARY COMMENTS ON THE PRESIDING MEMBER'S
PROPOSED DECISION

On July 2, 2015, the Carlsbad Amendments Committee (the "**Committee**") filed its Notice of Hearing On Robert Sarvey Motions and Committee Conference. The Notice informed the parties that a hearing will be held on July 13, 2015, to address Intervenor Robert Sarvey's ("**Intervenor**") Motion to Allow Testimony and Briefing on D. 15-05-05 ("**Motion 1**") and Intervenor's Motion to Require Applicant to Pay The Amenmdnt[sic] Fee Authorized by SB 83 ("**Motion 2**"). In the Notice, the Committee authorized other parties to address these issues in written filings. Accordingly, Carlsbad Energy Center LLC ("**Project Owner**") submits its opposition to both motions. Project Owner also submits its response to Intervenor's preliminary comments on the Presiding Member's Proposed Decision ("**PMPD**").

I. Motion 1 Should Be Denied Because Intervenor Has Already Briefed and Presented Evidence on the Impacts of a 500 MW PPTA and Because Intervenor Does Not Seek To Refute the Officially Noticed Matter.

On July 1, 2015, Intervenor filed Motion 1. The purpose of Motion 1 is to request the opportunity to provide evidence, testimony and briefing on the impacts to this proceeding of the Public Utilities Commission (the "**PUC**") decision approving a power purchase tolling agreement between Project Owner and San Diego Gas & Electric ("**SDG&E**"). Intervenor argues that further evidence and argument should be allowed because the Committee took official notice of the decision in the PMPD. Project Owner opposes the motion because Intervenor has already extensively briefed and presented evidence on the impacts of a 500 MW PPTA. Further, Intervenor cites to Section 1213 of the Title 20 regulations for the authority to offer additional evidence and testimony. However, that section only allows for reasonable opportunity to refute the officially noticed matter. It does not appear that Intervenor seeks to refute that the decision occurred or refute the contents of that decision. Rather, Intervenor intends to introduce evidence on the purported impacts of the decision. Accordingly, Project Owner requests that Motion 1 be denied.

a. *Intervenor has already presented testimony, briefing and evidence on the impacts of a 500 MW PPTA.*

Intervenor seeks to provide evidence, testimony and briefing on the impacts of the PUC decision to approve a 500 MW contract between Project Owner and SDG&E. Intervenor had ample opportunity to provide evidence, testimony and briefing on such impacts during the course of this proceeding. As can be seen in the chart below, Intervenor did in fact take that opportunity in relation to this issue by providing testimony, briefing, evidence, comments and documents into the record of this proceeding:

Source Document	Document Type	Document Title	Purpose Presented by Intervenor
Exhibit 6002, TN-203987, pp. 1 – 5.	Written Testimony	Alternatives – Rebuttal Testimony	Addresses regional need and impacts of reduced contracting capacity.
Exhibit 6003, TN-203988, pp. 1 – 2.	Written Testimony	Air Quality GHG Emissions – Rebuttal Testimony of Robert Sarvey	Addresses regional need and impacts of reduced contracting capacity.
TN-204131, pp. 154 – 62, 220 – 21.	Oral Testimony	Transcript of April 2, 2015 Evidentiary Hearing	Testimony as to impacts of a reduced capacity contract.
TN-204360	Briefing	Robert Sarvey’s Opening Brief	Makes extensive arguments on the impacts of a reduced contract capacity of 500 MW.
Exhibit 6008, TN-203986	Evidence	Opening Comments of Carlsbad Energy Center LLC on the Proposed Decision of Administrative Law Judge Yacknin	Demonstrate that Project Owner has proposed a reduced contracting capacity to PUC.
Exhibit 6010, TN-203993	Evidence	Opening Comments of San Diego Gas & Electric Company (U 902 E) on the Proposed Decision Denying Without Prejudice SDG&E’s Application for Authority to Enter into Power Purchase Tolling Agreement with Carlsbad Energy Center, LLC	Demonstrate that SDG&E would accept a reduced contract capacity.
Exhibit 6014, TN-204059	Evidence	Notice of Ex Parte Communication of Cities of Carlsbad, Escondido, Oceanside, San Marcos & Vista	Demonstrate that other entities have supported a reduced contract capacity.

Source Document	Document Type	Document Title	Purpose Presented by Intervenor
Exhibit 6015, TN-204060	Evidence	Notice of Ex Parte Communication of Poseidon Channelside	Demonstrate that other entities have supported a reduced contract capacity.
Exhibit 6016, TN-204061	Evidence	Notice of Ex Parte Communication of San Diego Regional Chamber of Commerce	Demonstrate that other entities have supported a reduced contract capacity.
Exhibit 6017, TN-204062	Evidence	Notice of Ex Parte Communication of Orange County Business Council, the San Diego Regional Economic Development Corp. and the Los Angeles Area Chamber of Commerce	Demonstrate that other entities have supported a reduced contract capacity.
TN-205163	Exhibit to PMPD Comments	SDG&E Advice Letter 2757-E	Demonstrate that SDG&E is complying with PUC orders on reduced contract capacity.
TN-204066	Document Introduced into Record By Intervenor	Public Utilities Commission Application 14-07-009, Proposed Alternate Decision of President Picker	Demonstrate that PUC has proposed a reduced contract capacity.
TN-203786	Document Introduced into Record By Intervenor	Proposed Decision of ALJ Yacknin	Demonstrate that Administrative Law Judge at PUC has proposed denying the power purchase tolling agreement.
TN-205174	Comments	Preliminary Comments of Robert Sarvey on PMPD	Raise questions as to impacts of reduced contract capacity.
TN-203949	Comments	Transcript of the March 18, 2015 Status Conference	Speak to impact of a reduced contract capacity.

Source Document	Document Type	Document Title	Purpose Presented by Intervenor
TN-203875	Pre-Hearing Conference Statement	Pre-Hearing Conference Statement of Robert Sarvey	Indicate that Intervenor intends to provide testimony on PUC procurement decisions and opportunities at Evidentiary Hearings.

Because Intervenor had ample opportunity to provide testimony, briefing and evidence on the impacts of a reduced contract capacity and because Intervenor did provide testimony, briefing, and evidence on that topic, Motion 1 should be denied.

b. Intervenor Seeks to Supplement Previous Arguments Rather Than Refute the Officially Noticed Matter.

Section 1213 of the Title 20 regulations authorizes the Commission to take official notice of any fact which may be judicially noticed by a California court. In California, a court can take judicial notice of the official acts of the legislative, executive, and judicial departments of the State of California. (Evidence Code § 452.) In the PMPD, the Committee took official notice of the Decision No 15-05-051 in PUC proceeding A1407009. In taking official notice, the Committee stated that the decision “conditionally approves the PPTA provided that the generation contracted for is reduced to 500 MW and the additional 100 MW that was proposed as gas-fired generation under contract with the project owner is instead procured from preferred resources along with the already required 200 MW, meaning that SDG&E is mandated to procure 300 MW of preferred resources in addition to ACECP’s 500 MW.” (PMPD, p. 3-5.) Project Owner believes that the Committee was well within the scope of its authority by taking official notice of the PUC’s judicially noticeable act.

Intervenor argues that Section 1213 authorizes a reasonable opportunity to “provide evidence and written or oral testimony and subsequent briefing on the impacts of D. 15-05-051 on this [Petition to Amend].” (TN-205208, p. 2.) However, Section 1213 merely provides for “a reasonable opportunity on request to **refute** the officially noticed matters by evidence or by written or oral presentation of authority.” (20 Cal. Code Regs. § 1213, emphasis added.) Based on the relief sought in Motion 1, it appears that Intervenor is seeking to supplement previous evidence, briefing, and testimony on the impacts of a reduced contract capacity. It does not appear that Intervenor is seeking to refute either the fact that the PUC reached a decision in proceeding A1407009 or that the decision reduced the contract capacity of the power purchase tolling agreement between Project Owner and SDG&E from 600 MW to 500 MW.

In its July 2, 2015 Notice of Hearing, the Committee ordered Intervenor “to file an offer of proof in which he describes with specificity the evidence he proposes to offer regarding decision D. 15-05-05 and its relevance to matters raised by the taking of official notice of that decision.”

(TN-205230, p. 3.) Project Owner believes that the Committee's order is appropriate and necessary. If Intervenor is unable to make an offer of proof that will refute either that the decision occurred or that the decision reduced the contract capacity of the power purchase tolling agreement, then Motion 1 should be denied.

II. Motion 2 Should Be Denied Because the Statutory Changes Made by SB 83 Do Not Have Retroactive Effect.

On July 1, 2015, Intervenor filed Motion 2. The purpose of Motion 2 is to ask for retroactive application of recently enacted legislation by requiring Project Owner to pay an amendment fee for the Petition To Amend currently under the Committee's review. Project Owner opposes Motion 2 because the statutory change made by SB 83 does not have retroactive effect.

There is a strong presumption against retroactive application of statutes. *Gadda v. State Bar of Cal.* (9th Cir. 2007) 511 F.3d 933, 937; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841. That presumption is rooted in constitutional considerations such as due process, the takings clause, and prohibitions on ex post facto laws. *Myers, supra*, 28 Cal.4th 828, 841. Retrospective operation is only given if it is clear from the act that the Legislature intended retroactive effect. *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828. "The Legislature, of course, is well acquainted with this fundamental rule, and when it intends a statute to operate retroactively it uses clear language to accomplish that purpose." *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 176. A statute that is ambiguous as to retroactive application is construed as unambiguously prospective. *Myers, supra*, 28 Cal.4th 828, 841.

Noticeably absent from Motion 2 is any argument that the Legislature intended the statutory changes to Section 25806 of the Public Resources Code to have retroactive effect and that such intent is clear from the act itself. Nothing in the operative language of the revised statute indicates that the statutory changes applies retroactively to pending amendment petitions. Though the Legislature had the opportunity to use clear language to make the statute apply retroactively, it chose not to do so. Further, the vehicle for the statutory change, SB 83, is inherently a prospective forward looking act as it is the Omnibus Resources Trailer Bill for 2015-16. The purpose of SB 83 is to make necessary changes related to the Budget Act of 2015 so that the 2015-16 budget can be implemented.

Neither the statutory change, nor the overall act, indicates that the Legislature intended retroactive application of this fee. Though the Legislature had the opportunity to make clear such intent, it chose not to do so. Therefore, Project Owner requests that Motion 2 be denied.

III. Intervenor's Preliminary Comments Contain Deficiencies That Undermine Intervenor's Credibility In This Proceeding.

On June 26, 2015, Intervenor submitted preliminary comments on the PMPD. (TN-205174.) The PMPD recommends that the California Energy Commission approve the Amended Carlsbad Energy Center Project ("ACECP"). Intervenor's comments dispute some of the Committee's findings in the PMPD. However, they also contain deficiencies that undermine the credibility of an intervenor who has consistently presented himself to the Committee as an expert. Project

Owner feels compelled to point out these deficiencies as Intervenor has, in Motion 1, argued that Intervenor is uniquely qualified to provide evidence and testimony on the PUC decision to approve a contract between Project Owner and SDG&E.

As an example of the deficiencies present in Intervenor's preliminary comments, while arguing against the Committee's finding on thermal efficiency, Intervenor states:

The evidence in the record shows that the LMS-100 utilized by the ACECP from start up to a 100 MW a period of ten minutes would have a heat rate of 20,598 Btu/kW-hr for an efficiency rating of around 17%.

(TN-205174, p. 3.)

The evidence Intervenor cites to, however, does not support this statement. The page cited by Intervenor is the first page of Table 5.1B-4, within Appendix 5.1B, of the May 2014 Petition to Amend, Part 2 (Exhibit 1001). A copy of this page is attached as Attachment 1 to this submission for the Committee's convenience. This page does, in fact, contain the number "20,598"; however, as shown on the page itself, this value is the lower *heating value of the fuel* (expressed in units of btu/lb) used by General Electric to estimate startup stack emissions from the ACECP units. In contrast, in Intervenor's PMPD comments, Intervenor characterizes this value as the *heat rate of the turbine* (expressed in btu/kw-hr) for an ACECP unit during the first 10 minutes following a startup.

In light of Intervenor's claim that Intervenor is uniquely qualified to inform the Committee, errors such as the above undermine the credibility of that claim. In the best case scenario, Intervenor either did not understand the information relied upon or accidentally entered the wrong number. In either instance, the distorted and misused number should have been an obvious error to an expert. Errors such as this undermine Intervenor's credibility as an expert.

As another example, the first sentence in Intervenor's preliminary comments contains a misleading statement. Intervenor states:

The evidence demonstrates that the amended CECP **would** create significant adverse impacts on energy resources if alternatives could reduce the project's use of fuel.

(TN-205174, p. 1, emphasis added.)

As support for this statement, Intervenor cites to Page 5.3-4 of the Final Staff Assessment.¹ On Page 5.3-4, in a section entitled "Alternatives to Reduce Wasteful, Inefficient, and Unnecessary Energy Consumption" contained within the Power Plant Efficiency section, the Staff actually said:

The amended CECP **could** create significant adverse impacts on energy resources if alternatives could reduce the project's use of fuel.

(Exhibit 2000, FSA, p. 5.3-4, emphasis added.)

¹ Intervenor's citation is to Page 764 of 1111. A review of the pdf version of the document available on the Energy Commission's website reveals that the reference points to p. 5.3-4 of the FSA.

“Would” is an absolute term whereas “could” is a term that indicates possibility. By changing the quote to “would”, Intervenor substantially changes the meaning of the sentence. Project Owner notes that this erroneous change assists the advancement of Intervenor’s argument that questions the Committee’s PMPD analysis. Ultimately, Intervenor’s own words call Intervenor’s credibility into question. This is particularly important to note as Intervenor claims to be uniquely qualified to present evidence on the subject of Motion 1.

IV. Conclusion

Project Owner believes that Motion 1 should be denied because Intervenor does not ask to refute the officially noticed matter, but rather, appears to want to supplement previous testimony, evidence and briefing. Motion 2 should be denied because, absent clear indication that the Legislature intended the statutory changes to have retrospective operation, SB 83 offers only prospective application. Project Owner believes that Intervenor has diminished credibility as an expert through inaccuracies, errors, and incorrect factual assertions in comments on the PMPD.

Dated: July 8, 2015

Locke Lord LLP

By:  _____

John McKinsey

Attorneys for Carlsbad Energy Center LLC

Attachment 1



Estimated Average Engine Performance NOT FOR GUARANTEE, REFER TO PROJECT F&ID FOR DESIGN

GE Power & Water

LMS100 PA Estimated Startup Stack Emissions - Gas Fuel Operation

Event	Duration (min)	Heat Input (MMBTU - HHV)	NO _x (lb)	CO (lb)	VOC (lb)
Startup	25	293.57	14.7	7.4	2.0

**** Fuel Must Meet GE Gas Fuel Spec (MID-TD-0000-1 LATEST REVISION)**

Based on a Ramp to 100% Load. 60.3°F, 79.1%RH, No Inlet Conditioning, Inlet/Exhaust Loss (inH₂O) 5.0/10.0, at 20.9ft. AMSL, Gas Fuel900-4103 (Steve Rose Sample 59F) Btu/lb (LHV/HHV) (20,598/22,836), Water Injected to 0 ppmvdc, Dry Secondary Cooler, G0179

VOC's are defined as non-methane, non-ethane, 50% saturated. VOC mass rates reported as methane.