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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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PETITIONS TO AMEND THE

CARLSBAD ENERGY CENTER PROJECT

Docket No. 07-AFC-06C

**ENERGY COMMISSION STAFF RESPONSE
TO INTERVENOR MOTIONS**

Intervenor Robert Sarvey has filed two motions: Motion 1 is to reopen the evidentiary record to receive evidence regarding the California Public Utility Commission's Decision, D. 15-05-051 (May 21, 2015), approving a 500 megawatt Power Purchase Tolling Agreement between San Diego Gas & Electric and the Carlsbad project petitioner.¹ Motion 2 is to require Petitioner to comply with the recently enacted provisions of SB 83 requiring AFC amendment petitioners to fully reimburse the Energy Commission for its costs to process a project amendment. The motions are addressed separately below.

I. There is No Apparent Reason to Re-open the Evidentiary Record.

The Committee's order requires Sarvey to file an offer of proof specifying what relevant evidence he would present were the evidentiary hearing re-opened. This approach is reasonable. The CPUC's decision on the tolling agreement was issued before briefs were filed, and the Committee has taken official notice of it. The content of the CPUC decision speaks for itself, it is already a part of the evidentiary record, and Sarvey and others have commented on, or may comment on, that decision. But the

¹ The petitioner for this amendment is Carlsbad Energy Center, LLC, called "Petitioner" in this document.

Committee should be skeptical about re-opening the evidentiary record. Re-opening serves no useful purpose if it is merely to allow further elaboration of arguments already made by Sarvey or other intervenors. Unless Sarvey has relevant evidence regarding a relevant issue of fact, re-opening the record serves no purpose.

II. Retroactive Application of SB 83 is Appropriate Only if there is Legislative Intent that the Statute be Applied Retroactively.

SB 83 is a budget trailer bill that includes a vast number of fiscally related amendments of various statutory provisions for various agencies. Because it is a budget trailer bill, related to the adoption of a budget on July 1, SB 83 provisions all became effective on July 1, 2015. One provision in SB 83 amends Public Resources Code section 25806 (a provision in the Warren-Alquist Act requiring agency reimbursement for AFC filings and compliance monitoring) to add a requirement that persons filing a petition to amend an Energy Commission-issued power plant license fully reimburse the Energy Commission for its expenses for the amendment, up to a specified amount. Sarvey moves to apply the new provisions to Petitioner in this case, effectively requiring payment for all amendment-related expenses, including those incurred prior to the July 1 effective date.

The Carlsbad petitions to amend were filed in mid-2014, and are now at the decisional stage. They can thus be described as pending. To require Petitioner to pay for all expenses of the Carlsbad petitions to amend would require the retroactive application of the new provisions in Public Resources Code section 25806 to the previous phases of the petition proceeding.

The general rule in California for new statutory provisions is that they do not apply retroactively unless the Legislature clearly intended them to do so. (E.g., *Bullard v. Calif. State Auto. Ass'n* (2005) 129 Cal.App.4th 211, 217; *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) The presumption against retroactive application is grounded in due process and in proscriptions against ex post facto laws. (*Bullard, supra*, at p. 217.) The “Legislature is well acquainted with these principles” when it adopts new legislation and intends retroactive effect. (*Ibid.*)

The new provisions in Section 25806, subdivision (e), provide no indication that the statute is to apply retroactively. Legislative intent, of course, can be discerned from other sources that constitute the legislative history of the legislation; such documents can be bill analyses prepared for the Legislature by its committee consultants, or prepared by the agency or entity proposing the statute in question. However, the Assembly and Senate bill analyses for SB 83 are silent on the issue of retroactivity regarding the new requirements of Section 25806, subdivision (e). Likewise, the bill analyses prepared by the Energy Commission and Natural Resources Agency (the initiators of the newly enacted provision), including the Enrolled Bill Report, are silent on the issue of its retroactive application. Accordingly, there is no indication of legislative intent that Section 25806, subdivision (e), apply retroactively.

Staff generally agrees with the sentiment expressed in Sarvey's motion—that petitioners for amendments to power plant licenses be required to fully compensate the Energy Commission for the expenses involved in the processing of the amendment petitions. Indeed, that is the very reason this agency supported the new statutory provision. However, because there is no expressed intent for retroactive application in either the statute or the pertinent legislative materials, Section 25806, subdivision (e), should not require Petitioner to pay for the agency's expenses incurred prior to the effective date of the new statute.

III. Petitioner Should Pay for Expenses Incurred Beginning July 1, 2015.

While Staff opposes retroactive application of the new statutory provisions, it believes that pending petitions (including those of Petitioner) should be required to compensate the Energy Commission for expenses incurred beginning July 1. A “going forward” application of the new statute avoids the issues of notice, due process, and retroactivity that are discussed above. Staff, and the adjudicators on the decision making side, are currently being informed of the necessity of record keeping for agency expenses incurred beginning with the July 1 effective date. This will allow adequate

record-keeping to account for additional agency expenses. Such an approach is fair and consistent with applicable law.

Date: July 8, 2015

Respectfully Submitted,



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