DOCKETED

Docket Number:	07-AFC-06C
Project Title:	Carlsbad Energy Center - Compliance
TN #:	206121
Document Title:	Project Owner's Opposition to Petitions for Reconsideration filed by Robert Sarvey and Robert Simpson
Description:	N/A
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Organization:	Locke Lord LLP
Submitter Role:	Applicant Representative
Submission Date:	9/16/2015 11:38:41 AM
Docketed Date:	9/16/2015

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: **Petitions to Amend The CARLSBAD ENERGY CENTER PROJECT**	**DOCKET NO. 07-AFC-06C**

Petition to Amend the Carlsbad Energy Center Project (07-AFC-06C)
Project Owner's Opposition to Petitions For Reconsideration
Filed by Robert Sarvey and Robert Simpson

I. INTRODUCTION

On May 31, 2012, the California Energy Commission ("CEC"), pursuant to its exclusive power to certify thermal power plants with a generating capacity of more than 50 MW, licensed the Carlsbad Energy Center Project (the "CECP"). The owner of the CECP, Carlsbad Energy Center LLC ("Project Owner"), filed a Petition to Remove on April 29, 2014, and a Petition to Amend on May 2, 2014 (collectively, the "PTA"). The PTA sought post-certification amendments to the project pursuant to Title 20, Section 1769 of the California Code of Regulations. The CEC, after a thorough and considered public process, approved the PTA at its July 30, 2015 Business Meeting. The Final Decision, authorizing Project Owner to build and operate the amended project, was docketed on August 3, 2015. On September 2, 2015, intervenors Robert Sarvey and Robert Simpson (collectively, "Petitioners") filed separate petitions asking the CEC to reconsider its decision. As described below, the petitions do not meet the requirements of Title 20, Section 1720 of the California Code of Regulations as they fail to adequately set forth: (1) new evidence that could not have been produced during the proceedings; or (2) errors in fact or change or errors of law. Further, the Petitions fail to explain why those matters could not have

been considered during the hearings or their effects on a substantive element of the decision.[1] Accordingly, Project Owner requests that the Commission deny both petitions.

II. Argument

A. Mr. Sarvey Improperly Seeks to Introduce New Evidence on Generating Capacity in his Petition.

The PTA sought authority to construct and operate six LMS-100 units. Following the California Public Utilities Commission's ("CPUC") approval of a 500 megawatt Power Purchase Tolling Agreement ("PPTA"), Petitioners repeatedly argued that the project was changed and that the CEC should only authorize enough units to fulfill the contract capacity. Project Owner consistently stated that it sought authorization to construct and operate the six unit project proposed in the PTA. The Commission correctly concluded that the CEC's review of the PTA is not bound by the parameters of CPUC's approval of a power purchase agreement. After a thorough review of the record, a six unit project was approved.

Mr. Sarvey now, for the first time, seeks to introduce evidence of a statement allegedly made by an attorney representing the Project Owner in the CPUC PPTA proceedings. This new "exhibit" comes in the form of written "testimony" by Mr. Sarvey that was submitted after the close of this proceeding to support the petition for reconsideration. Mr. Sarvey's "testimony" alleges that on May 19, 2015, at an all-party meeting in the CPUC proceeding, an attorney representing Project Owner informed the CPUC commissioners that only five turbines would be built. Mr. Sarvey's testimony merely relays his impression of what the attorney said. Project Owner believes that Mr. Sarvey is either mistaken in his conclusion or grossly misrepresenting the statement of Project Owner's representative in the CPUC proceeding. Project Owner, throughout this process, sought authority to construct six units.

[1] Section 1720 provides, "[a] petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision." (20 C.C.R. § 1720.)

Problematically, Mr. Sarvey does not provide any explanation as to why this is the first instance in which he has raised the alleged statement despite his repeated insistence that the project was no longer a six-unit project as a result of the CPUC decision. This was a point of contention between Project Owner and Mr. Sarvey, and yet for some reason he did not introduce the alleged statement until after the Final Decision. While the statement was allegedly made after the close of the April evidentiary hearings in Carlsbad, he had numerous opportunities to raise the issue, including: (1) in his preliminary comments on the PMPD where he raised questions as to the number of units Project Owner intends to build (TN-205174); (2) in his motion to reopen the record to provide evidence and briefing on the impact of a 500 megawatt power purchase tolling agreement (TN-205208); (3) in his offer of proof as to what evidence he would put on if his motion was granted (TN-205297); (4) at the hearing on his motion to reopen the record to provide evidence and briefing on the impact of the CPUC decision (TN-205543); (5) at the June 29, 2015 conference on the PMPD (TN-205294); or (6) when Mr. Sarvey filed additional comments on the PMPD in which he discussed the impacts of the approved power purchase agreement. (TN-205308.) Each and every time he could have raised the alleged statement, he failed to do so. Mr. Sarvey failed to introduce the alleged statement even as he was asking to reopen the record to provide evidence and briefing on the impacts of the CPUC decision. His attempt to introduce the "evidence" now, after a Final Decision has been made, is improper and lacks credibility.

As a final point on the number of units, despite Mr. Sarvey's assertion to the contrary, the record supports a six-turbine configuration. A six-turbine project was proposed in the PTA. A six-turbine project was described in responses to data requests. Staff analyzed a six-turbine project in its Staff Assessment. Testimony at the evidentiary hearings revolved around the impacts of the six-turbine project. Throughout this process, Project Owner sought the CEC's approval to construct six LMS-100 units. The number of units subject to the PPTA is irrelevant to the Commission's Decision in this case. The Commission, on the basis of the entirety of the

record of this proceeding, made the appropriate decision in authorizing Project Owner to construct a six-turbine project.

B. The Commission Was Not Required to Consider the Installation of Clutch Technology to Provide Voltage Support.

Both petitions assert that the Commission erred in approving the project because the Final Decision did not adequately consider the installation of clutch technology to allow the LMS-100 units to operate in synchronous condenser mode. That argument is unavailing as it was neither required to be considered by the regulations governing the siting process nor raised as a significant environmental issue by any parties – including Petitioners – during the course of the proceeding.

Consideration of clutch technology is not one of the extensive data adequacy requirements of the regulations that govern the power plant certification process. (See 20 C.C.R. § 1704; Title 20, Chapter 5, Appendix B.) Nor was it the subject of a data request by either Commission staff or other parties. No party sought to introduce any evidence on the merits of implementing clutch technology into the CECP. Both petitioners were intervenors on the topic of greenhouse gases, and both petitioners proposed alternate configurations of the project, yet neither broached the issue prior to or during the evidentiary hearings. Mr. Simpson, after the CPUC decision, did file a motion requesting denial of the PTA on the basis that the CPUC had required the CECP use an "entirely different technology which included a 'synchronous condenser.'" (TN-204877.) However, as noted in the order denying the motion, Mr. Simpson mischaracterized the CPUC decision. The actual language of the CPUC decision merely directed SDG&E to evaluate the feasibility and cost-effectiveness of clutch technology. Other than his mischaracterization, Mr. Simpson did not provide any other reason for considering the synchronous condenser issue. Mr. Sarvey's petition notes that he filed a motion asking the Committee to reopen the record to present evidence and briefing on the impacts of the CPUC decision. (TN-205990, p. 7.) Nowhere in his motion, his offer of proof for the motion,

nor in his argument at hearing, does he address the synchronous condenser issue. In his petition he notes that several of the documents proposed as exhibits contained references to the proposed clutch technology. Both documents he cites to call the CPUC to task for directing SDG&E to evaluate the clutch technology because: (1) it was outside the scope of the proceeding; and (2) relied on information not in the record of the proceeding. In other words, until the petitions for reconsideration were filed, the installation of clutch technology was not an issue raised by any party as a significant environmental issue.

At the adoption hearing, Sierra Martinez, a representative from the National Resources Defense Council, appeared to provide public comment on the PTA. Mr. Martinez asked the Commission to condition approval of the PTA on the requirement that the facility be outfitted with clutch technology. Mr. Martinez commented that the use of clutch technology would allow the LMS-100 units to operate as synchronous condensers which would allow the facility to provide voltage support in the San Diego region. Mr. Martinez further commented that doing so would facilitate California's long-term trajectory in reducing carbon emissions and that consumers would reap economic benefits of not separately building a free-standing synchronous condenser. (TN-205663, p. 45.) Mr. Martinez's comments, the only substantive discussion of the clutch issue from either a party or member of the public, were received as public comment on the date of the decision. Mr. Sarvey, as he did on the previously discussed capacity issue, now seeks to introduce, for the first time, evidence on the clutch issue. Mr. Sarvey fails to explain why these exhibits were not produced earlier. An examination of the metadata on the PowerPoint presentation he filed as Exhibit 2, for example, reveals that it was originally prepared in May of 2002 and was last printed in October of 2004. (TN-205995, metadata details.) The footnote on Exhibit 1 indicates that it was prepared or revised in December 2014. (TN-205991.) Exhibit 3 is dated December 23, 2013. (TN-205996.) Each of these documents was available well in advance of evidentiary hearings and could have been produced had any of the parties raised the issue of installing clutches. Even when given the

opportunity to provide an offer of proof for reopening the record on the basis of CPUC's decision, Mr. Sarvey did not provide these documents nor did he advance any arguments on the clutch issue.

Finally, Mr. Simpson's petition, in addition to making many of the same arguments made by Mr. Sarvey, argues that clutch technology should have been considered in an assessment of Best Available Control Technology for greenhouse gas emissions. (TN 205986, p. 7) Mr. Simpson's argument is premised on the mistaken belief that the clutches would function as emissions control technology rather than providing voltage support for the grid. Regardless, Mr. Simpson provides no explanation as to why this argument could not have been made during evidentiary hearings, particularly in view of the dates of the exhibits provided by Mr. Sarvey.

In light of the foregoing, it is clear that the petitioners have failed to establish that the Commission was required to consider the installation of the clutch technology.

C. The Petitions Fail to Adequately Set Forth Errors In Fact or Change or Errors of Law.

i. The CEC's Power Plant Siting Program Provides Robust Opportunities for Public Participation and Comment and is not Subject to the Requirements for Preparing an Environmental Impact Report.

A substantial portion of both petitions is founded upon the argument that the CEC process failed to comply with the CEQA Guideline 14 C.C.R. §15088 which regulates the evaluation of and response to comments made on a draft Environmental Impact Report ("EIR"). Mr. Sarvey repeatedly argues throughout his petition that the Commission failed to comply with Section 15088 by not responding to a number of comments he made on the PMPD. (TN-205990 pp. 8 – 17.) Similarly, Mr. Simpson argues that the Commission violated Section 15088 by failing to provide "meaningful consideration or response" to oral and written comments he provided at the adoption hearing.[2] (TN-205986, pp. 7 – 8.) The petitioners' arguments are

[2] Oddly, despite his concerns that his comments did not receive "meaningful consideration," Mr. Simpson also suggests that it was improper for the Commission to ask CEC Staff to respond directly to Mr. Simpson's comments. (TN-205986, pp. 10 – 11.)

unfounded because Guideline Section 15088 does not apply to the CEC's power plant siting program.

The CEC's power plant site certification program is a certified state regulatory program exempt from the requirements for preparing EIRs, negative declarations, and initial studies. (Pub. Res. Code § 21080.5; 14 C.C.R. §§ 15250 and 15251.) The CEQA Guideline cited by petitioners, Section 15088, governs the preparation of an EIR. It requires a lead agency to prepare written responses to comments received on a draft EIR and incorporate those comments and responses into the final EIR. (14 C.C.R. § 15088; *see also Tuolumne Jobs & Small Business Alliance v. Sup. Ct.* (2014) 175 Cal.Rptr.3d 601, 607 (explaining the process for preparing an EIR).) The CEC's certified state regulatory program, functionally equivalent to the CEQA process, does not involve the preparation of an EIR. The guideline cited by petitioners, therefore, is not directly applicable to the power plant siting program.

It is important to note that the process set forth in the Warren-Alquist Act, and its corresponding regulations, far exceeds CEQA requirements for public participation and comment.[3] The process used allowed the public to comment at any hearing and to submit e-comments online at any time, and from any location – even overseas. The process allowed members of the public who chose to become parties to submit data requests. Multiple hearings were held in Carlsbad for the benefit of the public including site informational hearings, a staff assessment workshop, and evidentiary hearings. Parties filed numerous motions and participated in evidentiary hearings. The staff assessment process involved receiving and responding to comments from the parties and the public. Parties briefed relevant issues

[3] The CEC process: requires informational hearings and site visits (20 C.C.R. § 1709.7); allows any person to comment on any relevant matter at any hearing or informational meeting (20 C.C.R. § 1711); authorizes any person to become a formal party through a petition to intervene (20 C.C.R. §§ 1207, 1712); allows any party to make information requests of an applicant and other parties (20 C.C.R. § 1716); permits any party to file a motion or petition on any aspect of the application proceeding (20 C.C.R. § 1716.5); allows parties to participate in evidentiary hearings (20 C.C.R. § 1748); and provides the opportunity to any person to comment on the Presiding Member's Proposed Decision (20 C.C.R. § 1749). The typical CEQA process allows the public to comment on scoping and draft EIRs. (14 C.C.R. 15072, 15083, 15087, and 15088.)

following the evidentiary hearings. There was a commenting period on the Presiding Member's Proposed Decision ("PMPD"). At the Business Meeting at which the Final Decision was adopted, the public and parties were allowed to participate. The Commission's public participation process involves extensive consideration to parties and members of the public who are not able to be present in person. In short, the CEC's power plant siting program is not only the functional equivalent of the EIR process, it surpasses the EIR process in terms of public participation and commenting opportunities. For all of the above reasons, Mr. Sarvey's objections on the issues of energy efficiency, operating restrictions, and combined cycle technology are unfounded as they are based on an erroneous application of Guideline Section 15088. Mr. Simpson's objection that the Committee violated Section 15088 by not responding to his comments on avian issues fails for the same reason.

ii. The Commission Made Appropriate Override Findings.

Mr. Sarvey's petition questions the override findings made in the Final Decision on the basis that Commission made an error of law. (TN-205990, pp. 15 – 17.) Mr. Sarvey believes that the Commission failed to consider consumer benefits as required by Section 25523 of the Public Resources Code. Mr. Sarvey also takes issues with several conclusions of law made by the Commission because he disagrees with the outcome. In contesting the override findings, however, Mr. Sarvey ignores the Commission's thorough consideration of the record in the amendment proceeding.

Mr. Sarvey incorrectly argues that the Final Decision fails to discuss or analyze the consumer impacts of the amended project. In the Final Decision, the Commission discusses a number of ways in which the amended project benefits consumers. The project will provide generation in a subarea of the San Diego load area for which CAISO has identified a need. (TN-205625, p. 9-8.) The energy marketplace has chosen simple cycle turbines as the better suited option for performing peaker duties necessary to meet that need. (TN-205625, pp. 3-11 and 9-7 – 9-9.) The project displaces more costly, less efficient, and higher emitting power

plants. (TN-205625, pp. 6.1-16 – 6.1-17 and 9-8.) The project reuses existing electricity infrastructure which avoids the higher economic and environmental costs of developing a new power generating facility at a greenfield location. (TN-205625, pp. 3-2, 9-5 and 9-9.) The project also boosts the local and regional economy and provides employment opportunities. (TN-205626 pp. 9-5 and 9-9.) Each of these considerations provides benefits to consumers in the region and those benefits can only be achieved by a project the market supports. The Commission clearly considered consumer benefits in reaching its override decision.

Mr. Sarvey also incorrectly argues that the Commission erred in reaching the conclusions of law that there are no feasible alternatives which would avoid or substantially lessen the significant cumulative visual impact of the project and that there is no more prudent or feasible means of achieving the public convenience and necessity. Mr. Sarvey points to the originally licensed project as a feasible alternative and one that achieves public convenience and necessity. The Commission performed a thorough evaluation of a number of alternatives which included the originally-licensed project. The Commission ultimately determined that the originally-licensed project was not a feasible alternative to the amended project because the original project failed to meet project objectives. The original project could not meet commercial qualifications for long-term power contract opportunities because the market chose the more flexible simple cycle configuration over the combined cycle configuration to provide rapid response to peak demand and to backup intermittent renewable resources. (TN-205625, pp. 3-10 – 3-12.) Consequently, the original project could not meet the regional need identified by CAISO. The original project also: failed to reduce inconsistency with land use LORS, would likely delay the removal of the EPS facility, and had a more prominent visual profile. (TN-205625, p. 3-12.) After thoroughly considering the original project, the Commission reached the conclusions of law that: (1) there was no feasible alternative that would avoid or substantially lessen the significant cumulative visual impact; and (2) that there was no more

prudent or feasible means of achieving the public convenience and necessity. While Mr. Sarvey may disagree, that does not mean the Commission erred in its conclusion of law.

iii. The Adoption Hearing Was Conducted In A Manner Consistent With the Commission's Rules and Regulations.

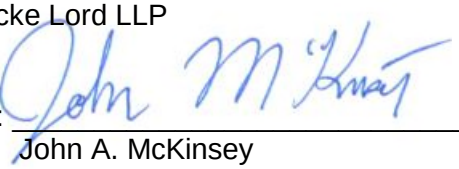
Mr. Simpson's petition incorrectly asserts that the Commission's adoption hearing was marred by several procedural errors. Mr. Simpson argues that he was denied the opportunity to adequately participate at the hearing despite the fact that he submitted extensive final oral and written comments. Mr. Simpson incorrectly argues that the Commission allowed new evidence from a "surprise witness" at the hearing because CEC Staff responded to Mr. Simpson's comments on avian impacts by noting that the thermal plume and noise issues had been considered in their analysis. Mr. Simpson insists that he should have been allowed to "cross examine" at the hearing even though the purpose of the hearing is simply to consider "final oral and written statements of the parties and final comments and recommendations from interested agencies and members of the public." (20 C.C.R. § 1754.) Mr. Simpson engages in unwarranted speculation as to the biases and motivations of individual commissioners. The vast majority of the petition is a hodge-podge of accusations, perceived slights, and rehashing of issues that does not meet the standards of a petition for reconsideration. Accordingly, the petition should be denied.

III. CONCLUSION

Project Owner believes that the record in this proceeding fully supported a favorable decision on the Petition to Amend. The petitions should be denied because they fail to adequately set forth any grounds for reconsideration.

Dated: September 16, 2015

Locke Lord LLP



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