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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**

Project Owner's Response to Robert Simpson's "Motion" to Reissue the PMPD and Reopen the Evidentiary Record

I. INTRODUCTION

On September 11, 2015, more than thirty days after the California Energy Commission ("CEC") docketed its Final Decision to approve a Petition to Amend and a Petition to Remove , (collectively referred to as the "Petition to Amend" or "PTA" hereafter) the Carlsbad Energy Center Project ("CECP"), Robert Simpson filed a document with the CEC entitled "Motion to Reissue Notice of Pending Members Proposed Decision and Reopen Evidentiary Record to Accept Revised Final Determination of Compliance." In the document, Mr. Simpson asks that the evidentiary record of the closed PTA proceeding be reopened to accept San Diego Air Pollution Control District's "revised Final Determination of Compliance." Mr. Simpson also argues that there was a defect in the CEC's process of providing notice that requires reissuing the Presiding Members Proposed Decision ("PMPD"). The document lacks both procedural and substantive merit. The CEC should reject the filing as improperly brought.

II. ARGUMENT

A. The Purported "Motion" By Simpson Has No Legal Meaning and Should Not Be Acted Upon By the CEC.

On August 3, 2015, the CEC docketed its Final Decision approving the PTA. In doing so, the CEC concluded the proceeding to evaluate the PTA. Mr. Simpson's "motion", filed in the online docket of a closed proceeding, is a document without legal meaning under the

regulations that govern actions before the CEC. It is not a motion brought under Title 20, Section 1716.5 in an active siting proceeding nor is it timely to function as a petition for reconsideration brought under Title 20, Section 1720.[1] Rather, it is a document that has been docketed in the compliance phase of a completed amendment proceeding. The CEC granted the PTA which authorizes the Project Owner to construct and operate the amended CECP. The Commission's Final Decision stands as the decision document in a concluded proceeding. The procedural posture of the amendment proceeding is not altered by either of the two pending petitions for reconsideration. (*See* TN-205543, pp. 20 – 21 (Staff Counsel concurring that agency final decisions with pending reconsideration petitions stand as final decisions unless and until modified).) Quite simply, Mr. Simpson lacks procedural foundation to bring a "motion" in a concluded siting proceeding.

Mr. Simpson fails to cite any authority that allows motion practice to take place in a completed PTA proceeding. There is no provision in the CEC's governing regulations that authorizes motion practice in general CEC business. Title 20, Chapter 2, Article 2 of the California Code of Regulations provides general provisions that "apply to all proceedings and hearings held before the [CEC]." (20 C.C.R. § 1200.) A review of those regulations does not provide general authorization for law and motion practice. Instead, the CEC has promulgated regulations that authorize such motion procedures only in particular actions. For example, Title 20, Sections 1712 and 1716.5 of the California Code of Regulations, provide authority to file motions in active power plant siting proceedings. Mr. Simpson has not, and cannot, point to any authority that would allow a "motion" in a concluded proceeding. Nor can Mr. Simpson point to any authority that would establish a right to a hearing on a "motion" brought in the compliance phase of a power plant siting proceeding. While the CEC's regulations encourage robust public participation in CEC proceedings, they do not authorize Mr. Simpson's "motion" to have the

[1] Nor is it a document of other legal significance such as a petition for rulemaking brought under Title 20, Section 1221 or complaint and request for investigation brought under Title 20, Section 1231.

legal meaning intended. There is no procedural basis for the CEC to hear a motion related to a completed PTA proceeding.

The "motion" was filed in the docket of a concluded proceeding. Law and motion practice applies only to specific proceedings and not general CEC business. The "motion" lacks a procedural foundation. The "motion" advances no argument as to the CEC's authority to hold a hearing on the substantive points it attempts to raise. Because the CEC lacks a legal foundation to take action on the "motion," it should reject Mr. Simpson's filing.

B. Mr. Simpson's "Motion" Lacks Substantive Merit.

Mr. Simpson's motion, in addition to lacking procedural merit, also lacks substantive merit. Even if it had been brought in an active siting proceeding, the Commission would deny the motion because it is ill-founded. There is no reason to reopen the evidentiary record or reissue the PMPD.

i. There Is No Reason to Reopen the Evidentiary Record.

Mr. Simpson's "motion" argues that the evidentiary record of the amendment proceeding needs to be reopened so that a "revised Final Determination of Compliance" can be considered. The San Diego Air Pollution Control District ("SDAPCD") has clarified that it did not issue a revised Final Determination of Compliance ("FDOC"). (TN-206108.) The analysis performed by the SDAPCD, which was subsequently incorporated into the PMPD, remains unchanged. The SDAPCD did, however, issue a revised Notice of Issuance of the FDOC. The revised notice was necessary to correct a typo in the original two-page notice which incorrectly identified the amended CECP as a combined cycle power plant. (TN-206108 & TN-206110.) That same notice properly identified the project as using simple-cycle turbines in the detailed equipment description. (TN-206110.) The typo in the notice did not affect any of the analysis performed by either the SDAPCD or the CEC. The project was reviewed and approved with a simple-cycle turbine design. Mr. Simpson either misunderstood the nature of the revised Notice of Issuance or, as he did in his June 3, 2015 Motion to Deny AFC, has mischaracterized the actions of

another agency. (*See* TN-204969, in which the Committee tasked with reviewing the PTA denied Mr. Simpson's motion while noting that he mischaracterized the CPUC decision to approve a power purchase agreement.) Regardless, there is no revised FDOC and there is no reason to reopen the evidentiary record of the concluded amendment proceeding.

ii. There Was No Error in the Process That Led to A Final Decision on the PTA.

Mr. Simpson also argues that the PMPD itself needs to be reissued. The basis for his argument is that the California Department of Fish and Wildlife ("CDFW") was not provided a copy of the PMPD when it was issued. Mr. Simpson argues that under Title 20, Section 1749 of the California Code of Regulations, the CEC was required to distribute a copy of the PMPD to the CDFW. Mr. Simpson's argument, however, does not have substantive merit because even if the allegations are true, there is no error in lack of direct notice to the CDFW of the PMPD and no defect in the process that led to a decision on the PTA.

By its terms, Section 1749 does not expressly require notice to CDFW in every proceeding in which a PMPD is issued. Rather, it requires distribution to "interested agencies, parties, and to any person who requests a copy." (20 C.C.R. § 1749.) The term "interested agency" is not defined in either the Warren-Alquist Act or the regulations promulgated by the CEC. (Pub. Resources Code §§ 25100 – 25141; 20 C.C.R. § 1201; 20 C.C.R. §1702.) As an undefined term, "interested agency" only has the general meaning that a Siting Committee for a project might assign to it in evaluating a project under the CEQA-equivalent power plant siting program. By its context in the regulation, a reasonable interpretation of "interested agency" would be an agency which, informed of the proceeding, expresses a desire to actively participate in the process.

As noted by CEC Staff, the CDFW was provided an electronic copy of the PTA on August 12, 2014. (TN-206123, pp. 6 – 7.) The CDFW was clearly aware of the amendment proceeding, and, as staff indicates, was consulted about mitigation and biological resources. (*Id*.) However, the CDFW did not become an active participant in the PTA process nor did it

provide any comments on the PTA itself. There is, therefore, no reason for the Siting Committee to have considered CDFW to be an "interested agency" when it did not express the desire to participate in the PTA process. The CEC did not violate the express terms of Section 1749 even if, as Mr. Simpson claims, CDFW did not receive a copy of the PMPD. Mr. Simpson's argument lacks substantive merit and there is no reason to reissue the PMPD.

III. CONCLUSION

Mr. Simpson's "motion" lacks both procedural and substantive merit. It is brought after the conclusion of a proceeding to evaluate a petition to amend. Under the regulations that govern the CEC process, the "motion" is improperly brought and should be rejected.

Dated: September 18, 2015

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