DOCKETED

Docket Number:	07-AFC-06C
Project Title:	Carlsbad Energy Center - Compliance
TN #:	206160
Document Title:	Robert Sarveyâ€™s Reply to Project Owners and Staffâ€™s Opposition To Petitions For Reconsideration
Description:	N/A
Filer:	Robert Sarvey
Organization:	Robert Sarvey
Submitter Role:	Intervenor
Submission Date:	9/18/2015 4:15:49 PM
Docketed Date:	9/18/2015

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Petition to Amend The Carlsbad Energy Center	Docket Number 07-AFC-06C

ROBERT SARVEY'S REPLY TO PROJECT OWNERS AND STAFF'S OPPOSITION TO PETETIONS FOR RECONSIDERATION

New Evidence on Generating Capacity is properly submitted pursuant to Section 1720.

The applicant claims that my reconsideration petition improperly seeks to introduce new evidence on the generating capacity of the project.[1] The applicant asserts that the testimony I introduced could have somehow been raised at some other time during the proceeding. Section 1720 (a) provides that "*a petition for reconsideration must specifically set forth new evidence that despite the diligence of the moving party could not have been produced* ***during evidentiary hearings*** *on the case*." Evidentiary hearings concluded on April 2, 2015. As the applicant admits[2] the all party meeting occurred on May 19, 2015 after the close of the evidentiary hearings so the evidence could not have been produced during the evidentiary hearing so the applicant's complaint is without merit.

Secondly the applicant claims that the, "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. The applicant provides no evidence that I am mistaken or that I grossly misrepresented the statement of the project owners representatives at the CPUC

[1] **Project Owner's Opposition to Petitions For Reconsideration Filed by Robert Sarvey and Robert Simpson Page 2,3 of 11**

[2] **Project Owner's Opposition to Petitions For Reconsideration Filed by Robert Sarvey and Robert Simpson Page 3 of 11**

All-Party Meeting. Perhaps the applicant would like to subpoena CPUC Commissioner Sandoval who asked the question whether Carlsbad Energy would construct five or six turbines.

The project owner then claims that the new testimony is improper because it should have been provided during the proceeding. Since the evidentiary hearings closed on April 2, 2015 there was no opportunity to provide the evidence since as mentioned above and it is not disputed the all-party meeting occurred May 19, 2015 so the testimony could not have been provided at the evidentiary hearing.

There is substantial evidence in this proceeding that I already detailed in my reconsideration request that confirms the Carlsbad Energy Center will be 527.5 MW not 632 MW.[3] The applicant provides no sworn evidence that the project will be 632 MW as no NRG representative ever provided testimony under oath. We are left with statements by the applicant's attorney which is not substantial evidence. Public Resources Code Section 21082.2 provides that substantial evidence shall include "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." The statute further provides that "argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence." Erroneous statements provided by the applicant's attorney are not substantial evidence.

Finally the project owner states, "*The number of units subject to the PPTA is irrelevant to the Commission's Decision in this case.*"[4] An accurate, stable, finite project description is an essential element of an informative and legally sufficient environmental review under CEQA[5] and is a requirement of a Certified Regulatory Program.[6] All of the evidence in the proceeding demonstrates that the ACECP will be 527.5 MW not 632 MW.

The Commission is Required to Consider the Installation of Clutch Technology to Provide Voltage Support.

[3] Exhibit 501, TN 205299 **San Diego Gas & Electric Advice Letter 2757E, Sarvey Reconsideration Exhibit TN 205993 Testimony of Robert Sarvey**

[4] **Project Owner's Opposition to Petitions For Reconsideration Filed by Robert Sarvey and Robert Simpson Page 4 of 11**

[5] CEQA guidelines 15124; County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185.

[6] California Public Resources Code §21080.5(d)(3)(i).

The applicant claims that the Commission is not required to consider the clutch technology because it was not raised "as a significant environmental issue by any parties – including Petitioners – during the course of the proceeding. The applicant then admits that, *"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."*[7]

Obviously any evidence concerning the clutch technology could not have been raised at the evidentiary hearings because Commissioner Florio and Commissioner Picker raised the issue in a proposed decision I docketed on April 6, 2015 four days after the close of the hearings.[8] Commissioner McAlister already cautioned the parties not to raise issues from a proposed decision at the evidentiary hearings.

> COMMISSIONER McALLISTER: I want to just caution all of us not to get involved (inaudible) on that point. That's a different agency. It's a proposed decision. It's by an ALJ, and so it actually doesn't change the facts that we are operating under now in the near term here. And if and when there's advances – there's advances or a final decision or alternative, whatever, ends up in that process, which is not this process, then maybe that does change the factual landscape, but we are not there right now.[9]

Finally the Committee themselves docketed D. 15-05-051 on June 2, 2015 which was two months after the close of evidentiary hearings so no party could have addressed the clutch technology at the evidentiary hearings. As stated above Mr. Simpson in his June 3, 2015 motion tried to require the applicant to file an amendment to the project to include the clutch technology. The committee denied his motion on June 10, 2015.

---

[7] **Project Owner's Opposition to Petitions For Reconsideration Filed by Robert Sarvey and Robert Simpson Page 4 of 11**

[8] TN 204066

[9] RT 4-2-15 Page 163 of 283 Lines 20-25 and Page 164 of 283 Lines 1-4

According to the transcript of the July 30, 2015 business meeting the presiding member felt that, *"getting a better Evidentiary Record on the clutch technology and such installations would be very valuable*."[10] The presiding member also stated that, "*We certainly could have benefitted, and anyone can benefit, from additional information and additional ideas brought into the record at the right time. And the day of Adoption Hearing not necessarily that although if that's the day it comes in we will listen to it and we will do our best with it.*"[11] According to the CEC Chairman the clutch technology could not considered in the final decision because of "*the Once Through Cooling Deadline and the urgency of getting this thing done"*[12] The fact is almost a full two months before the July 30, 2015 business meeting Mr. Simpson did offer a motion which would have given the commission an opportunity to examine the clutch technology and the Committee refused to consider it.

It's clear that the Commissioners believe the clutch technology should be examined in siting cases. Chairman Wieisenmiller who was not aware that Mr. Simpson raised the clutch issue 2 months before the business meeting stated about the clutch technology, "*I would certainly encourage a very serious investigation going forward"*.[13] The presiding member Douglas also stated, "*I don't consider that question to be rightfully placed in this forum at this point and time for this plant. For future applications, it's certainly something that I think after this discussion the staff will look at it and we will look at.*"[14] A Certified Regulatory Program, "*must require that an activity not be approved as proposed if there are feasible alternatives or mitigation measures available which would substantially lessen any significant environmental impact."*[15]

Even the CEC Staff admits that the clutch technology is feasible stating, "*Staff agrees with Messrs. Simpson and Sarvey that adding a clutch is technically feasible on a variety of combustion turbines, and that a few California combustion turbines have clutches installed.*"[16] Whether the clutch technology would substantially lessen any significant environmental impact

[10] July 30, 2015 Business Meeting Transcript page 84 of 100 lines 1-3
[11] July 30, 2015 Commission Business Meeting Page 80 Lines 2-7
[12] July 30, 2015 Commission Business Meeting Transcript Page 84 of 100 Lines 12-14
[13] July 30, 2015 Commission Business Meeting Transcript Page 84 of 100 Lines
[14] July 30, 2015 Commission Business Meeting Transcript Page 85 of 100 Lines 10-15
[15] California Public Resources Code §21080.5(d)(2)(i).
[16] **ENERGY COMMISSION STAFF RESPONSE TO PETITIONS FOR RECONSIDERATION AND INTERVENOR SIMPSON'S MOTION TO REISSUE THE PMPD AND REOPEN THE EVIDENTIARY RECORD Page 4**

can only be determined by a thorough analysis by CEC Staff. There are no analyses in the record of this proceeding. The Encina plants once through cooling deadline does not excuse the commission from complying with California Public Resources Code §21080.5(d)(2)(i).

The CEC's Power Plant Siting Program is required to provide written responses to significant environmental points raised during the proceeding pursuant to Public Resources Code §21080.5(d)(2)(iv)

The applicant argues that the CEC has a certified regulatory program and is not subject to the requirements of Section 15088 which requires evaluation of and response to comments made on a draft Environmental Impact Report ("EIR"). But the CEC as a certified regulatory program and pursuant to California Public Resources Code §21080.5(d)(2)(iv) must provide written responses to "significant environmental points" raised during the evaluation process. As detailed in my request for reconsideration the CEC failed to acknowledge, analyze, or provide written responses to several environmental issues that I raised during the course of the preceding. Therefore reconsideration is warranted and the commission must provide responses to significant environmental points I and others raised during the proceeding in order to comply with California Public Resources Code §21080.5(d)(2)(iv).

The applicant argues that the CEC's significant opportunities to provide public comment excuse the CEC from complying with their statutory duty to provide written responses to significant environmental points raised by intervenors and the public. The applicant fails to mention the requirements of California Public Resources Code §21080.5(d)(2)(iv) which render the applicant's argument indefensible.

Mr. Simpson's motion to recirculate the PMPD should be granted.

Mr. Simpson's reconsideration moves that the PMPD be recirculated since the California Department of Fish and Game was not notified of the FSA or the PMPD. The CEC staff opposes this motion but the CEC Staff admits that, "**The California Department of Fish and Wildlife (CDFW) is not on the list-serves for this project although many other State**

agencies are."[17] CEQA Guidelines Section 15086(a) state, "*The lead agency is required to request comments on the draft EIR from responsible and trustee agencies.* ***It also must seek comments from the CDFG*** *as to the impact on the continued existence of any endangered or threatened species."* CEC staff argues that, "*On August 12, 2014, Staff emailed a copy of the petition to amend to CDFW and other interested agencies, including U.S. Fish and Wildlife and the Coastal Commission."*[18] This does not meet the requirements of Commissions Rules of Practice and Procedure. Section 1747 of the rules of practice and procedure relating to the FSA require that**, "***At least 14 days before the start of the evidentiary hearings pursuant to section 1748 or at such other time as required by the presiding member, the staff shall publish the reports required under sections 1742.5, 1743, and 1744 as the final staff assessment, and* ***shall distribute the final staff assessment to interested agencies****, parties, and to any person who requests a copy.*" Section 1749 of the Commission's Rules of Practice and Procedure require that the Presiding Member's Proposed Decision, "*be published and within 15 days* ***distributed to interested agencies****, parties, and to any person who requests a copy."* Neither of these requirements has been met by the Commission.

Outside of the Rules of Practice and Procedure the courts have held that an agency which has a certified regulatory program exemption under Guidelines Section 15251 must also consult trustee agencies in the process of preparing an EIR substitute. (See: *Environmental Protection Information Center v. Johnson*, (1985) 170 Cal. App. 3d 604.) The CEC staff merely sent the CDFG the amendment application but the FSA and the PMPD have not been circulated to CDFG as required by law. The commission has failed to follow its own rules.

Conclusion

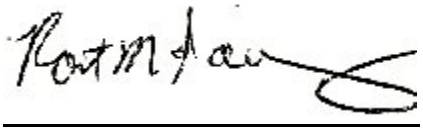
For all the reasons detailed above the Commission should grant reconsideration of their final decision on the ACECP.

---

[17] **ENERGY COMMISSION STAFF RESPONSE TO PETITIONS FOR RECONSIDERATION AND INTERVENOR SIMPSON'S MOTION TO REISSUE THE PMPD AND REOPEN THE EVIDENTIARY RECORD** Page 6

[18] **ENERGY COMMISSION STAFF RESPONSE TO PETITIONS FOR RECONSIDERATION AND INTERVENOR SIMPSON'S MOTION TO REISSUE THE PMPD AND REOPEN THE EVIDENTIARY RECORD Page 6,7**

Respectfully Submitted,



Robert Sarvey