

DOCKETED

Docket Number:	07-AFC-06C
Project Title:	Carlsbad Energy Center - Compliance
TN #:	206409
Document Title:	Order Dismissing Robert Simpson's Complaint and Request for Investigation
Description:	N/A
Filer:	Muoi-Lynn Tran
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	10/21/2015 11:47:01 AM
Docketed Date:	10/21/2015



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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COMPLAINTS AND INVESTIGATIONS REGARDING THE
PETITIONS TO AMEND THE
CARLSBAD ENERGY CENTER PROJECT

Docket 07-AFC-06C

ORDER DISMISSING ROBERT SIMPSON'S COMPLAINT AND REQUEST FOR INVESTIGATION

On September 21, 2015, Robert Simpson filed a document entitled "**Complaints and Requests for Investigation**" (Complaint) in the Carlsbad Energy Center - Compliance Docket (07-AFC-06C).¹ In the Complaint, Mr. Simpson alleges that the California Energy Commission (Commission), each Commissioner, the Hearing Officer, and George Piantka, Director of Environmental Services for the applicant NRG Energy, have violated legal requirements as alleged in three other documents identified by Mr. Simpson as: "**60-Day Notice to Sue**," "**Motion for Reconsideration**," and "**Motion to Re-notice PMPD and Reconsideration Reply**." He cites the same documents for purposes of identifying the facts upon which the Complaint is based.

The Complaint

The **60-Day Notice to Sue** addresses violations of federal law, and the **Motion for Reconsideration** was partially granted at the Commission's September 22 Business Meeting for the sole purpose of allowing the California Department of Fish and Wildlife to comment on the Presiding Member's Proposed Decision for the Carlsbad Energy Center Amendments. Both documents were filed by Mr. Simpson in the Carlsbad Energy Center - Compliance Docket earlier in September, and the **60-Day Notice to Sue** was refiled on September 21, 2015.²

There is no document filed with the Energy Commission with the title "**Motion to Re-notice PMPD and Reconsideration Reply**," although Mr. Simpson did, on September 21, 2015, file the following documents along with the Complaint:

- "**Motion to Reissue Notice of Pending Member's Proposed Decision and Reopen Evidentiary Record to Accept Final Determination of Compliance**"³

¹ TN 206161-2

² TN 205985 (also filed as TN 206161-1), TN 205986

³ TN 206069 (also filed as 20161-3)

- **“Reply to Energy Commission Staff and Applicant Response to Petitions for Reconsideration and Motion to Reissue the PMPD and Reopen the Evidentiary Record”**⁴
- **“Reply and Comments Regarding Applicant Response to Motion to Reissue the PMPD and Reopen the Evidentiary Record and Sierra Club Comments”**⁵

These documents contain arguments made in the **60-Day Notice to Sue and Motion for Reconsideration**, including arguments that the Commission has erred in its conclusions regarding the project’s compliance with various aspects of state and federal law and in its interpretation of applicable procedural requirements. These allegations were considered and rejected by the Commission in issuing its Decision on the Carlsbad Energy Center Amendments.

The Complaint Fails to Satisfy Regulatory Requirements and Otherwise Lacks Merit

The Energy Commission’s regulations provide that “[c]omplaint proceedings shall include any adjudicatory proceeding in which the commission determines whether to sanction or to take other appropriate action against, a person for alleged violation of any statute, order, decision or regulation adopted, administered, or enforced by the commission Investigation proceedings shall include any adjudicatory proceeding in which the commission determines the applicability of any statute, order, decision, or regulation adopted, administered, or enforced by the commission.” (Cal. Code Regs., tit. 20, § 1230, subd. (a).)

The Commission Chair is authorized to dismiss a complaint or request for investigation upon determining that there is insufficiency or a lack of merit. (Cal. Code. Regs., tit. 20, § 1232, subd. (a).)

Section 1231 of the Commission’s regulations allows “any person...to file a complaint alleging a violation of a statute, regulation, order, program, or decision adopted, administered, or enforced by the commission.” (Cal. Code Regs., tit. 20, §1231.) This section also establishes the elements that are required in a request that the Commission initiate a complaint proceeding or an investigation. (Cal. Code Regs., tit. 20, §1231.) Mr. Simpson’s Complaint lacks the information required by subdivision (b)(6) of section 1231 – “the authority under which the commission may take the action requested.” In referencing subdivision (b)(6), Mr. Simpson cites Commission Regulations section 1236, which identifies the scope of a Commission decision on a complaint that has been served and heard, as well as procedural requirements for consideration of the decision. Section 1236 is limited in scope and applies only to Commission consideration of a proposed decision of a committee or hearing officer that is issued pursuant to Regulations section 1235 in a Complaint or Investigation proceeding. This section does not authorize the Commission to revoke or suspend the Carlsbad license, nor does it authorize the Commission to conduct further hearings on the Carlsbad project.

⁴ TN 206141 (also filed as TN 20161-5)

⁵ TN 206161-4

Moreover, the purpose of the Commission's Complaint and Investigation process is not to provide a forum to challenge the Commission's compliance with state and federal law, including provisions governing the site certification process. Nor does it provide an opportunity to raise the same environmental and procedural issues raised – and addressed by the assigned committee and the Commission – during the course of the Carlsbad Energy Center Amendment proceedings. Other laws govern when, where, and how committee and Commission siting decisions may be challenged. Those challenges must occur in different fora separate and distinct from the forum designated for the Commission's Complaint and Investigation process, and Mr. Simpson has filed documents in those other fora. Thus, this complaint fails to satisfy regulatory requirements and lacks merit.

Further, the complaint fails to state a claim against George Piantka of NRG Energy. The Complaint does not allege actions or omissions by Mr. Piantka that violated any statute, order, decision or regulation adopted, administered, or enforced by the Commission. Moreover, because Mr. Piantka is not an Energy Commission Commissioner, he had no ability to – and did not – vote to approve and adopt the Carlsbad Energy Center Project Amendments Final Decision.

The legal and factual claims Mr. Simpson made in his **60-Day Notice to Sue** will be addressed as part of that process, should Mr. Simpson file a lawsuit. Similarly, with the exception of the issue of notice to the California Department of Fish and Wildlife, the claims Mr. Simpson made in the **Motion for Reconsideration** and in other documents he filed on September 21, 2015, have already been addressed by the Commission as part of the Carlsbad Energy Center Project Amendments proceeding. In addressing that Motion, it is worth noting that Commission found the following:

The other issues Mr. Simpson raises are not new to this proceeding. Rather than describe new evidence that could not have been produced at the evidentiary hearings and its effect on a substantive element of the Commission Decision, he reargues issues that were previously presented and discussed during the evidentiary hearings, in comments on the PMPD, and to the full Energy Commission at the July 30, 2015 adoption hearing. The new information he identifies could have been produced during the evidentiary hearings; having failed to convince us of the efficacy of his positions, he seeks to have another opportunity to bring in additional evidence and argument. Absent some new and compelling reason for reopening and reconsidering the Commission Decision, not presented here, it is past time to end those debates.

(September 22, 2015, Commission Order Partially Granting Robert Simpson's Petition for Reconsideration and Motion to Reopen the Evidentiary Record, p. 2.)

In sum, the Complaint fails to satisfy regulatory requirements, raises previously adjudicated issues, and has been brought in the wrong forum, and should be dismissed for insufficiency and lack of merit.

FINDINGS

1. Mr. Simpson's Complaint was filed on September 21, 2015, in the Carlsbad Energy Center Amendment docket.
2. The Complaint cites to three documents: 1) a **60-Day Notice to Sue** (also re-filed the same day as the Complaint); 2) a **Motion for Reconsideration** (not re-filed the same day as the Complaint); and 3) a **Motion to Re-notice PMPD and Reconsideration Reply**. The first two are found in the docket of the Carlsbad Energy Center Amendment docket. There is nothing in the docket with the title of the third document, although there are three documents filed the same day as the Complaint, each with a name similar to that of the third document.
3. The first two documents cited allege that the Commission, individual Commissioners, the Hearing Officer, and an individual employed by the project proponent have violated various provisions of federal law, and that the Commission has both erred in its conclusions regarding the project's compliance with various aspects of state law and in its interpretation of applicable procedural requirements. The three additional documents filed with the Complaint contain similar allegations.
4. The required elements of a Complaint or Request for Investigation are found in section 1231 of the Commission's regulations.
5. The Complaint fails to identify the authority under which the Commission may take the action requested in the Complaint, which is a required element under section 1231, subdivision (b)(6).
6. The Commission's Complaint and Investigation process does not provide a forum for challenging the Commission's compliance with state and federal law.
7. The Commission's Complaint and Investigation process does not provide a forum for a participant in a power plant licensing case to argue environmental and procedural issues raised and addressed during the course of the proceeding.

ORDER

The Complaint is **DISMISSED WITHOUT PREJUDICE**.

Date: October 21, 2015

Original signed by
ROBERT B. WEISENMILLER
Chair