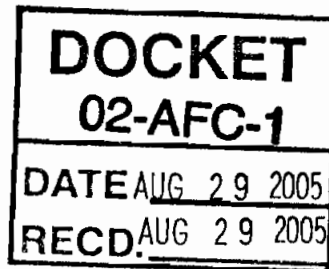


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August 29, 2005

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Re: Docket No. 02-AFC-1

Dear Ms. Rodriguez:

Enclosed for filing with the California Energy Commission are one original and 12 (Twelve) copies of the **Caithness Blythe II, LLC's Opening Brief, for the Blythe Energy Project Phase II (02-AFC-1)**.

Sincerely,

A handwritten signature in cursive script that reads "Scott A. Galati".

Scott A. Galati
Counsel to Caithness Blythe II, LLC

SAG/cp
Enclosures

...Blythe II\Cover Docket 07-29-05

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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the Matter of:

Application for Certification for the
BLYTHE ENERGY PROJECT II

DOCKET NO. 02-AFC-1

**CAITHNESS BLYTHE II, LLC'S
OPENING BRIEF**

Caithness Blythe II, LLC (CB II), hereby files its Opening Brief for the Blythe Energy Project II (BEP II). This brief contains arguments, with appropriate references to the evidentiary records, in the contested areas of Transmission System Engineering, Soil & Water Resources, Traffic and Transportation, and Socioeconomics only. All other areas are uncontested. In addition to the arguments, attached to this brief is a summary of the Conditions of Certification that have been modified from the versions contained in the Final Staff Assessment and to which CB II and Staff agree. The attachment also includes Conditions that CB II proposes for disputed topic areas.

TRANSMISSION SYSTEM ENGINEERING

The dispute relating to Transmission System Engineering is based on solely on the extent of the Commission's jurisdiction. CB II had submitted lengthy testimony and legal argument concerning the Commission's jurisdiction over activities that will be conducted inside the existing Western Area Power Administration (Western) owned and operated Buck Boulevard Substation, which will be performed by Western. (8/1/05 RT 50). In general, Staff believes that it should review and approve those activities while CB II and Western do not. CB II does acknowledge that the Commission has authority

to review the activities as part of its obligation to evaluate potential impacts to the environment under the California Environmental Quality Act (CEQA). However, since all of the activity will take place within the fence line of the Buck Boulevard Substation, which was previously evaluated and all impacts mitigated (including full habitat compensation) during the licensing of the Blythe Energy Project (BEP), the Commission can easily make the appropriate findings that all activity conducted by Western to interconnect BEP II will not result in significant environmental impacts. Staff has not identified any significant adverse unmitigated impact from these activities. With no mitigation necessary, the Conditions of Certification need not apply to any of those activities. Similarly, since Western will comply with LORS applicable to its activities, there is no legal reason to require the Commission Compliance Project Manager (CPM) to review and approve such activities. While Western has agreed to informally share its designs and provide status reports of its activities, no Commission approval is required in order for the Committee to make the necessary findings that BEP II will not adversely impact the electrical system, will not result in significant environmental impacts, and will comply with all applicable LORS. CB II proposed modifications to Staff Conditions of Certification to remove any reference to Western's activities to be conducted inside Buck Boulevard Substation thereby limiting the requirements to only those transmission facilities leading up to the Buck Boulevard Substation. These modifications are contained in our Testimony and are reproduced for the Committee's use in the Attachment to this Brief. Included is Staff's latest version of **TSE-9**, which is acceptable to CB II.

WATER RESOURCES

The Committee should authorize the use of groundwater beneath the project site as proposed by CB II because it results in no significant environmental impacts and complies with all applicable laws, ordinances, regulations and standards (LORS). Specifically, the Committee should make the following findings:

1. Staff and CB II agree that the groundwater pumping will not result in significant adverse impacts to water supply or water quality of any existing well user.

2. The use of groundwater for BEP II will not result in degradation of the water quality of the regional aquifer.
3. The use of groundwater as proposed by BEP II will not result in significant adverse impacts to downstream users of Colorado River surface water.
4. The body of law that is applicable to Colorado River surface water does not apply to the groundwater use proposed by BEP II.
5. The use of the groundwater beneath the BEP II site complies with the Commission's water policy as explained in its 2003 Integrated Energy Policy Report (2003 IEPR Policy).

CB II believes that since the Commission licensed BEP in March 2001, allowing the BEP to use groundwater in exactly the same fashion as proposed by BEP II, the Commission should only reach a contrary decision on BEP II if there are sufficient changed circumstances or a change in law that requires different findings for BEP II. To ensure the integrity of the CEC Licensing process, the evidentiary record must clearly identify those changed circumstances or change in law. CB II believes that Staff has failed to make any such showing. In response to the Committee's questions to describe such changed circumstances, Staff offered the following:

1. Staff understands the groundwater system better. However, staff's testimony regarding groundwater pumping and hydrogeologic connection between the Colorado River and the Mesa groundwater was essentially the same. (8/1/05 RT page 166)
2. The Committee was confused about the movement of groundwater, not on the basis of any new studies, but on Staff's failure to address the movement. (8/1/05 RT page 168-169)
3. The adoption of the 2003 IEPR Policy creates a change in applicable LORS. (8/1/05 RT page 166-167)

4. The surface water system has changed as a result of alleged cutbacks of allocation of surface waters to California parties in the Colorado River System. (8/1/05 RT pages 166-167).

No Changed Circumstances Requiring Contrary Decision

Staff made essentially the same arguments regarding its claim that groundwater beneath the Palo Verde Mesa is actually Colorado River surface water in BEP as it has in BEP II. In the BEP Decision, Staff's position that groundwater and Colorado River Surface water are hydraulically connected is well documented. (BEP Commission Decision, page 196). CB II agrees that there is a hydraulic connection, but such connection is the same as the hydraulic connection between all groundwater and all surface water sources globally. The question is: Does this hydraulic connection result in a loss of water to downstream users, which could be characterized as a significant impact? The fact that Staff now "understands" and has "communicated" such potential connection better than they did in BEP is irrelevant. In BEP, the Committee acknowledged a potential connection relying on the same Accounting Surface Model upon which Staff again relies. While Staff claims to be better able to explain the underpinnings of the Accounting Surface Model now, the fact remains clear that they have failed to identify how such connection results in an impact to downstream users for BEP II when the Committee rejected the same arguments in BEP.

Staff's opinions are unsupported and inconsistent. For example, despite asserting that all pumped groundwater would derive from the Rannells drain and deplete surface waters in a volume that could be accounted for on an annual basis, staff admitted in testimony that water from the drain would actually only travel about 600 feet from the drain toward the BEP II well after 30 years of pumping, (8/01/05, RT page 286). In addition, despite claiming that pumping could reduce water quality in the regional aquifer, staff revealed in its testimony that the affected area of the aquifer would only be within about 2,000 feet of the project well. Staff has not identified or conducted any new studies between BEP and BEP II to support the Committee to come to a contrary conclusion for BEP II. The Commission found in BEP, ***assuming the linkage described by Staff and by the Accounting Surface model***, that pumping of

groundwater will not result in significant cumulative or regional impacts to downstream users of Colorado River Surface water. (BEP Commission Decision, pages 205-206).

Staff has also opined that the reduction in Colorado River surface water allocations to California is a significant changed circumstance, which would support a finding in BEP II that is contrary to BEP. Dr. Harvey testified that the proposed Voluntary Water Conservation Offset Program (WCOP) actually benefits downstream junior water rights holders by forever limiting the ability of PVID to irrigate the acres involved in the WCOP. Dr. Harvey explained that PVID's superior water rights are not quantified by volume of water, but rather by the area of land it can supply water to for reasonable and beneficial uses. As Dr. Harvey described, by eliminating a number of those acres from using water for irrigation, the Colorado River surface water that could be applied to those lands will be available to downstream junior water rights holders such as Metropolitan Water District (MWD). (8/12/05 RT page 137).

In addition, California's water entitlements to the Colorado River have not been reduced, and remain at 4.4 million acre-feet per year as they have been quantified for decades. The reductions in California's diversions derive from surplus waters that were previously available when Arizona and Nevada did not divert their full entitlements. As has been understood for decades, as these states now draw their full entitlements, California agencies must adjust to the absence of surplus waters. California agencies have responded with numerous adjustments including water transfers, water treatment and wastewater recycling, conservation, development of supplemental water supplies including desalination. Planning and development of these water programs has been ongoing for more than a decade, and does not constitute a change of conditions since the BEP case was decided.

Staff's assertion that the 2003 IEPR is a change in law that requires the Committee in BEP II to reach a different decision than the Commission in BEP is addressed below.

No Impact to Existing Well Users

Staff found in its Final Staff Assessment (FSA) that pumping of BEP II with BEP will not result in significant adverse impacts to well productivity or to increased pumping costs to nearby groundwater users on the Palo Verde Mesa. (FSA page 4.9-57). CB II's expert agreed (Testimony of Oliver Page 5). Staff also opined that the groundwater pumping would not degrade the water quality of any well except possibly the BEP well. (8/1/05 RT page 286:10-21).

No Degradation of Water Quality of the Aquifer

CB II's expert disagrees with the Staff's opinion that the pumping of the groundwater would cause an upwelling of salinity that would degrade the regional aquifer. In fact, Staff opined that such upwelling, if it occurred, would not be significant enough to affect any nearby well owner, except the BEP well. (8/1/05 RT page 286:10-21). By Staff's own admission, this is not regional degradation, since the BEP well is nearby the BEP II site. While Mr. Page disagreed with Staff's assertion that the well would cause a significant upwelling of salinity from the Bouse Formation, Staff has predicted that if such upwelling did occur, the extent of such upwelling would be about 2,000 feet encompassing the BEP II and BEP well fields (8/1/05 RT 209). Staff did agree that, if such upwelling occurred, the effect would be an increase in salinity in the wells from BEP and BEP II over time (8/1/05 RT page 211:11-18).

Staff has asserted that the only potential affect of any remaining upwelling, if it occurred, would be to any future user of groundwater in and around the well field (8/1/05 RT page 212). First, the zoning does not allow residential uses in and around the power plant, which is located north of the I-10 corridor at the eastern edge of the Blythe Airport in an industrial area (AFC, Land Use Figures 7.2-1 and 7.2-2). Second, with all the available land around the City of Blythe, it is extremely unlikely that anyone would construct residences in and around two large power plants. Finally, the City of Blythe is constructing a potable water line in the right of way of Hobsonway to deliver water to the community of Mesa Verde. Such water line would be the most likely source of clean potable water for new development. (See also discussion of the groundwater quality below.)

Finally, CB II's expert disagrees with Staff characterization of the potential upwelling. Mr. Page believes that any upwelling, if it occurred, would only take place much closer to the actual wellhead, with most of the increase in salinity being drawn into the well itself. (8/1/05 RT pages 126-127) Staff testified that to date, the predicted upwelling of salinity has not been detected in the BEP well. (8/1/05 RT page 214)

LORS Compliance

The written Water Resources Testimony of Dr. Jeff Harvey and Mr. Ed Smith provides a description of the LORS that are applicable to surface water of the Colorado River. Dr. Harvey testified that there are no LORS relating to regulation of groundwater beneath the Palo Verde Valley or Mesa. This testimony is consistent with the United States Bureau of Reclamation (Bureau) position. The Bureau is the Watermaster appointed by the Supreme Court to administer the use of Colorado River surface water in Arizona, California, and Nevada. Dr. Harvey's opinion is consistent with the Bureau's as follows:

However, notwithstanding the Secretary of the Interior's responsibilities under the Decree, we know of no laws, ordinances, regulations or standards currently being exercised to control or regulate groundwater pumping or other well users upon the Palo Verde Mesa. *(Letter dated June 14, 2002 from Robert W. Johnson, Regional Director United States Bureau of Reclamation to Terry O'Brien, Director, CEC Facility Siting Division, page 2)*

Although there has been more than a decade of discussion about regulation of groundwater in and around the Colorado River using a hydrogeologic model that is known as the "Accounting Surface Model" the Bureau of Reclamation has not adopted it as a law, ordinance, regulation, standard or even policy. The Bureau has not applied it or its underlying principles to any well in either the Palo Verde Valley or the Palo Verde Mesa. Staff's suggestion that this policy is imminent is inaccurate and is exactly what Staff said at evidentiary hearing in fall of 2000 during the Blythe I proceeding. The use of the Accounting Surface to regulate wells on the Mesa is no more imminent than it was in 2000 and as explained by Dr. Harvey; its implementation is even less likely now that it was in 2000. Therefore it simply does not apply.

The Bureau has stated that the purpose of such a policy would be to ensure there is no increase in consumptive use of Colorado River surface water thereby ensuring that there will be no impacts to the Colorado River system or junior water rights holders. However, even if the policy was adopted, the Bureau has reviewed BEP II's **Voluntary** Water Conservation Offset Plan, and has determined that:

We conclude that with implementation of the WCOP, including the criteria stipulated above, BEP II will not increase the consumptive use of Colorado River water in California and therefore, will not have impacts on the Colorado River system or junior water rights holders within that system. Therefore Reclamation approves the voluntary WCOP as submitted. *(Letter dated June 14, 2002 from Robert W. Johnson, Regional Director United States Bureau of Reclamation to Terry O'Brien, Director, CEC Facility Siting Division, page 3, with WCOP attached)*

Staff's conclusion that the use of the groundwater use proposed by BEP II will result in use of Colorado River surface water and will negatively impact either the Colorado River system or junior water rights holders is inconsistent with the opinion of the Colorado River Watermaster and on that basis alone can be rejected by the Committee. This is the exact conclusion reached by the Commission in BEP when presented with essentially the same argument by Staff.

The Use of Groundwater As Proposed Complies with 2003 IEPR Policy

While CB II acknowledges that the 2003 IEPR Policy did not exist at the time of the BEP Decision, that fact in and of itself does not establish sufficient change in law to require a contrary decision in BEP II. That policy provides:

Consistent with the Board Policy¹ and the Warren-Alquist Act, the Energy Commission will approve the use of fresh water for cooling purposes by power plants which it licenses only where alternative water supply sources and alternative technologies are shown to be "environmentally undesirable" or "economically unsound". (2003 IEPR, page 41)

First, the 2003 IEPR Policy merely restates the policies and laws considered by the Commission in BEP. The most relevant and primary underpinnings of the 2003 IEPR is State Water Resources Control Board Policy 75-58 (Policy 75-58). The

¹ This reference is to SWRCB Policy 75-58.

Commission in BEP applied the principles of Policy 75-58 to the BEP groundwater although it acknowledged that the groundwater was not “fresh water”, but rather low end brackish water due to its high TDS (Commission Decision page 207). However, even applying the Policy 75-58, the Commission specifically found that the use of the groundwater beneath the site for wet cooling complies with Policy 75-58 and nothing in Policy 75-58 would require dry cooling (Commission Decision page 207).

Policy 75-58 establishes alternatives to fresh water for the Commission to consider when evaluating alternative sources of water use for wet cooling when applying the 2003 IEPR Policy. In order of preference, that guidance is as follows:

1. Wastewater being discharged to the ocean.
2. Ocean water.
3. Brackish water from natural sources or irrigation return flows.
4. Inland wastewaters of low total dissolved solids.
5. Other inland waters.

As Dr. Harvey testified, the groundwater proposed for use should not even be considered to be fresh water in the strictest sense, because of its high TDS. However, if applying the guidance in Policy 75-58, the groundwater should be characterized in Category 3, which is more preferable than reclaimed water that has been approved by the Commission in other siting cases as compliant with 2003 IEPR Policy. (8/1/05 RT 127-129).

Dr. Harvey and Ed Smith, General Manager of PVID, testified that the water in Rannells Drain consists of a mixture of agricultural runoff water, water intercepted from high groundwater and surface water that has been diverted from the Colorado River but had not been used and therefore is being returned to the Colorado River. (8/1/05 RT pages 129-132). All of the water in Rannells Drain is accounted for as a part of the Colorado River surface water system, and is returned to the Colorado River for use by downstream users. Yet Staff asserts that the use of this surface drain water complies

with the 2003 IEPR Policy, yet the brackish groundwater does not. Staff also bases much of its opinion on a very limited number of severely outdated water quality samples of groundwater and Rannells Drain water, which Staff believes shows that Rannells Drain water is of lower quality than the groundwater. The testimony of Ed Smith and Dr. Harvey indicate just the opposite for most of the drain, most of the time. (8/1/05 RT pages 139 and 141) The groundwater is the consistently poorest quality water available and is not fresh water. Colorado River surface water is fresh water that should be conserved according to the IEPR policy guidance. The use of Rannells Drain water will result in a loss of surface water return flows directly to the Colorado River and therefore should be avoided.

Staff further testified that dry-cooling is economically feasible. CB II does not dispute that it can operate the plant with dry cooling, and in fact, the applicant is currently building a dry-cooled plant in another state (8/1/05 RT). However based upon the market which is most accurately defined by the Southern California Edison Request for Offers (RFO) process, the added costs of dry cooling would most likely force the project out of the market since it exposes BEP II to significant penalties based on being unable to deliver power when most critically needed as described in the written and oral testimony of Robert Looper, Robert Gavahan, Philip Dean and Thomas Cameron (8/1/05 RT pages 378-384. Staff admits it did not do a market study when determining if dry cooling is commercially feasible. Staff even fails to acknowledge that dry-cooling, which it admits costs more and limits output and therefore revenue, would place BEP II at an economic disadvantage to the neighboring BEP, which is wet-cooled. Such advocacy for a position in the face of logic is difficult to understand and CB II believes goes far beyond a technical difference of opinion. Lastly, the Commission in BEP highlighted the appropriate question with respect to dry-cooling:

The appropriate inquiry on this project is not whether applicant *could* use an alternative cooling technology, but whether it *must*. (BEP Commission Decision, page 207).

The Commission answered that question in BEP based upon the exact same set of facts now presented to the Committee in BEP II:

After review of alternative cooling technologies and their associated costs and benefits, and consideration of the lack of any potentially significant adverse impacts associated with BEP's proposed use of resources, we conclude that the water supply as proposed by the applicant is acceptable. (BEP Commission Decision, page 207)

The Committee should reject Staff's assertion that dry cooling or the alternative use of Rannells Drain water comply with 2003 IEPR Policy while the groundwater does not, and reach the same conclusion as the BEP Decision.

TRAFFIC AND TRANSPORTATION

Dr. Morris testified that based on modeling *and* field measurements conducted during operation on a clear cold calm day, overflight of BEP II would result at the most in light to moderate turbulence that should not cause the pilot to lose control or cause damage to the airplane (Testimony of Dr. Steve Morris and Testimony of Kennard Kosky). Mr. Sheble continues to use the Runway 26 to instruct pilots and testified that because he and other pilots have knowledge of the potential turbulence they can stay away from it (8/2/05 RT page 159-160). While Mr. Sheble states that the power plant is a hazard, he continues to use the ILS for training even though the approach takes the aircraft over the cooling towers of BEP. Mr. Wolfe has the ability to warn all pilots and has failed to do so even though he says he believes there is a significant safety problem. Mr. Wolfe will not provide that warning until paid a great deal of money to do so. (8/2/05 RT 162-163)

CB II believes that it has proven that the only risk, if any, is to pilots who land using Runway 26 on a cool calm day without a warning of turbulence. CB II has agreed that it will take a Condition of Certification that such warning must be accomplished prior to operation of the plant. In addition to warning pilots, CB II agrees to be subject to a Condition of Certification that it will not operate the plant until the traffic pattern to Runway 26 is changed from a left-hand pattern to a right-hand traffic pattern. Such a change would eliminate overflight of BEP II. Lastly, since nothing forces a pilot to utilize Runway 26, CB II further agrees to be subject to a Condition of Certification to designate another runway as a calm wind runway further eliminating any overflight of BEP II. The City of Blythe, the operator of the airport, agrees to implement such

changes. CB II continues to believe that even without the change in traffic pattern or designation of a calm wind runway, warning alone will mitigate any potential impact.

Further, Staff's opinion that the City of Blythe made erroneous findings to support its own override should be rejected. The Government Code specifically authorizes such override, and Staff does not disagree that the City can make such override. Staff objects to the findings that are entirely within the purview of the City of Blythe to make. Although Staff may have made different findings if it were the City of Blythe, Staff has no authority to do so. Staff's rejection is on the basis that the BEP II could produce smoke and water vapor and therefore is specifically prohibited. The Riverside County Airport Land Use Commission approved BEP with full knowledge that smoke and water vapor could be produced and therefore conditioned their finding of consistency. Staff reviewed and approved those conditions and included them in their recommended conditions of certification for BEP. (Commission Decision, page 257, and on page 260, TRANS-6). The City's override incorporates those exact conditions, (Attachment to Testimony of Robert Looper on Traffic and Transportation).

Staff also disagrees with the City's Override findings because they believe there are outstanding environmental impacts, which precluded the City's finding of no environmental impacts. While Staff may opine that there are impacts, this opinion is in no way binding on the City or even the Committee itself. The City has been the lead agency under CEQA and has processed other projects and presumably can make its own determination of whether or not a project results in significant environmental impacts.

The Committee should reject Staff's conclusion that the project does not comply with applicable LORS related to the Comprehensive Land Use Plan (CLUP).

Socioeconomics

Dr. Harvey agrees with Staff that the project's voluntary WCOP does NOT result in significant loss of farm labor jobs. On that basis, we strongly disagree with Staff that conditions of certification placing limits on farmed lands that may participate in the

WCOP are nonetheless appropriate. Staff's proposed conditions are not in response to any identified impact, unnecessarily limit implementation of the WCOP, and would not mitigate any adverse effects. While job displacement is taking place within the Blythe area due to land fallowing for other water transfers, the WCOP neither causes nor contributes in any significant way, as Staff has acknowledged. In fact, the direct and indirect jobs created by the BEP II project itself results in net gain in employment in the area, and a net positive employment and economic impact in the community. In addition, as was done during the construction of BEP, CB II will be active in seeking local employment where possible. To that end, CB II has committed to giving 10 cents per construction labor man-hour to the community college to be used in job training programs. With an estimate 1.2 million man-hours, the total amount available to the Community College will be approximately \$120,000. To address the concerns that exist in the community already regarding farm labor job loss, CB II will conduct an outreach program to the farm labor community so that farm workers know of and can voluntarily participate in the training programs performed by the Community College. Such outreach program will include advertisement on Spanish-speaking radio station; passing out flyers (in English and Spanish) to the communities of Mesa Verde, and notifying the Rural Assistance League or other farm labor organization of the training opportunities at the Community College. We request that the Committee acknowledge these elements of the BEP II project as an economic enhancement, and reject Staff's proposed mitigation associated with the voluntary WCOP.

Dated, August 29, 2005



Scott A. Galati
Counsel to Caithness Blythe II, LLC

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:

Docket No. 02-AFC-1

Application for Certification for the
BLYTHE ENERGY PROJECT PHASE II

PROOF OF SERVICE

I, Carole Phelps, declare that on August 29, 2005, I deposited copies of **Caithness Blythe II, LLC's Opening Brief, for the Blythe Energy Project Phase II (02-AFC-1)** in the United States mail at Sacramento, California with first class postage thereon fully prepaid and addressed to the following:

Original plus 12 copies delivered to:

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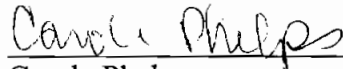
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I declare under penalty of perjury that the foregoing is true and correct.



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