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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	Docket No. 13-AFC-01
Application for Certification for the	)	
Alamitos Energy Center	)	

APPLICANT'S REPLY BRIEF

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APPLICANT'S REPLY BRIEF

Pursuant to the Committee's *Notice of Second Evidentiary Hearing, Scheduling Order, and Further Orders*,[1] AES Alamitos Energy Center, LLC (the "Applicant") submits this Reply Brief ("Brief") in support of the Application for Certification ("Application") of the Alamitos Energy Center ("AEC").

I. INTRODUCTION

This Brief responds to the Opening Brief submitted by the Los Cerritos Wetlands Land Trust ("Trust") (hereinafter, "Trust's Brief"). The Trust's Brief is an unsigned document replete with factual and legal errors, conjecture and speculation.[2] We respond to the Trust's most egregious errors below.[3]

II. THE TRUST'S "THRESHOLD" ISSUES ARE AN IMPERMISSIBLE ATTEMPT TO RELITIGATE ISSUES ALREADY DECIDED BY THE COMMITTEE.

The "Threshold Issues" identified by the Trust and a majority of the arguments in the Trust's Brief are an untimely attempt to reopen issues that have already been resolved in this proceeding. The Trust continues its collateral attack on the Committee's October 14, 2016

[1] TN#: 214564.

[2] TN# 214629-1. The Trust's Brief is unsigned and does not contain the name, address, telephone number and email address of the filer, as required by Section 1208.1 of the Commission's regulations.

[3] For convenience, this Brief is structured to parallel the Trust's Brief.

Committee Ruling Re: Staff's Motion For Summary Adjudication (the "October 14, 2016 Ruling" or the "Ruling," TN #: 214007), ignoring the fact that the Ruling is final.

Despite its earlier statements of contrition and acceptance of the Ruling[4], the Trust continues in its attempts to contest the Ruling it had previously accepted. The Committee should disregard the Trust's continued attempts to collaterally attack the Ruling that demolition of the existing Alamitos Generating Station ("AGS") is not part of the AEC project.

The Trust's Brief contains few citations to the evidentiary record. We are not surprised by the lack of citation, because there is simply no substantial evidence to support the Trust's arguments. As just a few examples of the Trust's bald assertions without citations:

- "The Trust has demonstrated through evidence in the record…." No citations to the record are provided. (Trust's Brief, p. 3.)
- "And it is reasonably foreseeable from the record…." No citations to the record are provided. (Trust's Brief, p. 4.)
- "However, it is reasonably foreseeable that construction and operation of the proposed AEC…." No citations to the record are provided. (Trust's Brief, p. 4.)

These "Threshold Issues", which are sprinkled throughout the Trust's Brief, are nothing more than assertions devoid of evidentiary support. Because the "Threshold Issues" attempt to relitigate settled matters and lack any evidentiary support, the Commission should give the Trust's arguments on these issues no further consideration.

III. DEMOLITION OF THE EXISTING AGS IS NOT PART OF THE PROJECT BEFORE THE COMMISSION.

The Trust's contention that the demolition of the existing AGS ("AGS") is part of the AEC has already been decided by the Committee's October 14, 2016 Ruling. Notwithstanding that this issue is settled, the Trust's Brief attempts to relitigate the issue. To support its

[4] TN# 213929-1, *Memo on Upcoming Status Conference Subjects*, pdf p. 3 (Oct. 7, 2016).

argument, the Trust relies on speculation and conjecture, rather than the evidentiary record. The Commission should reject the Trust's attempt to relitigate this issue.

A. The Trust's Assertions of Improper "Piecemeal" Review of the AEC and Demolition of the AGS Is Misplaced.

The California Environmental Quality Act ("CEQA")[5] "forbids 'piecemeal' review of the significant environmental impacts of a project." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209, 1222, citing to *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal. App. 4th 1344, 1358.) A "project" is defined as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and … [involves] the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (14 C.C.R. § 15378(a).) The "facts of each case will determine whether and to what extent an [environmental impact report] must analyze future expansion or other action." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.) Based on the facts of this proceeding, it is clear that the AEC is not receiving improper piecemeal review.

When evaluating a claim of piecemeal review, CEQA requires consideration of "how closely related the acts are to the overall objective of the project." (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal. App. 4th 1214, 1226.) Multiple actions may constitute a single project where "the purpose of the reviewed project is to be the first step toward future development" or "when the reviewed project legally compels or practically presumes completion of another action." (*Banning Ranch Conservancy*, supra, at 1223.)

[5] CEQA may be generally found at Pub. Resources Code § 21000 et seq.

In this case, as the Committee has ruled, the demolition of the AGS is a not a "step" that must be taken for the construction and operation of the AEC, "nor is it a crucial functional element, a required element, dependent, or functionally linked to the AEC." (Committee's October 14, 2016 Ruling, pp. 7-8; also see, Ex. 1072, p.3.) Instead, the primary purpose of the AEC is to construct and operate a modern, state-of-the-art natural gas powerplant that meets local area electrical reliability needs. (Ex. 1500, p. 1-4.) AEC will be constructed on a separate brownfield "site", as that term of art is defined in the Warren-Alquist Act[6], within the boundaries of a much larger area that contains the AGS and other facilities. (Ex. 1500, p. 1-1.) Construction of the AEC is not conditioned upon demolition of the AGS. (Ex. 1500, p. 1-1.) Therefore, the demolition of the AGS is not a necessary "step" that must be taken to obtain the objective of constructing and operating the AEC, and thus is not part of the "whole of the project" before the Commission.

Two projects "may properly undergo separate environmental review", without constituting piecemealing, "when the projects have different proponents, serve different purposes, or can be implemented independently." (*Banning Ranch Conservancy,* supra, at 1223.) Assuming that demolition of the AGS is considered a project for the purposes of CEQA[7], the AEC and demolition of the AGS may properly undergo separate environmental review as the two projects serve different purposes and can be implemented independently. As stated above, the purpose of the AEC is to construct and operate a modern, state-of-the-art natural gas powerplant on a new, brownfield site that meets local area electrical reliability needs. (Ex. 1500, p. 1-4.) In contrast, demolition of the AGS could serve the purpose of removing aging infrastructure, transform the AGS property, and enhance the quality of life and the quality of the

[6] Pub. Resources Code § 25119.

[7] See Section IVA, below.

environment of Long Beach. (Ex. 1031, Recitals.) Each can and will be implemented independent of the other. Therefore, CEQA does not compel review of both the AEC and demolition of the AGS as a single project.

B. The Trust's Arguments regarding the MOU With the City of Long Beach Attempt to Substitute Speculation and Hearsay for the Plain Language of the MOU.

In an attempt to support its argument that demolition of the AGS is part of the AEC, the Trust argues that the Memorandum of Understanding ("MOU") between the City of Long Beach and AES "require[s] demolition of AGS in coordination with the construction of AEC." (Trust's Brief, p. 1.) The Trust's argument regarding the MOU is not supported by any evidentiary basis, and is premised instead upon terms that the Trust *believes* are in the MOU, not terms that are *actually* in the MOU.

There is no "promise" in the MOU "to demolish the AGS as soon as the proposed AEC is operational," as asserted by the Trust without any citations. (Trust Brief, p. 8.) Instead, the terms of the MOU very clearly set forth an intent to "work cooperatively towards the *eventual* demolition" of the existing AGS. (Ex. 1031, Recitals.) The MOU also makes clear that demolition is a "voluntary commitment". (Ex. 1031, Recitals.) This voluntary commitment is contingent upon three things: (1) the decision by AES to "permanently cease operations" of the existing AGS Units 1-6; (2) the receipt of applicable City permits; and (3) receipt of any of governmental approvals. (Ex. 1031, §§1, 4; 1072, p. 3.) The MOU does not reference the AEC AFC proceeding in any manner, and there are no performance requirements by either the City or AES that are contingent upon the any particular outcome in the AEC's AFC proceeding. (See generally, Ex. 1031.) Demolition of the existing AGS is not a "condition of approval" for any approval that will be granted by the City. (*Id.*)

One of the more troubling aspects of the Trust's Brief is the complete lack of citations to the evidentiary record to support its bald assertions. Pages 6-7 of the Trust's Brief contain spurious and completely unsupported statements as to what the City Council "was led to believe", the reason for public comment by the City at the evidentiary hearings for the AEC, and the purpose of the City Council's "approval of the MOU". Speculation, conjecture and, unsupported opinions do not constitute evidence. (See, 20 C.C.R. § 1212(c)(2).) Such statements must be disregarded.

If it is necessary to interpret the intent of the MOU, the Commission need not rely on the Trust's unsupported speculation. Instead, the Commission should refer to the plain language of the MOU. Basic rules of statutory construction and contract interpretation are instructive. Where statutory language is clear and unambiguous, the "plain meaning of the statute must govern"[8] as "there is no need for [statutory] construction, and courts should not indulge in it."[9] Thus, "if the words of the statute, given their ordinary and popular meaning, are reasonably free from uncertainty, the courts will look no further to ascertain the legislative intent."[10] Similarly, "the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code § 1638.) In short, the plain words of the MOU govern.

As the MOU makes clear, there are a number of steps that may need to take place before a decommissioned plant can be demolished, including approvals by the California Independent System Operator, the California Public Utilities Commission and the State Water Resources

[8] *People v. Dieck* (2009) 46 Cal. 4th 934, 940.

[9] *People v. Overstreet* (1986) 42 Cal. 3d 891, 895.

[10] *County of Orange v. Flournoy* (1974) 42 Cal. App. 3d 908, 912 (ref. *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 760 [110 Cal.Rptr. 257]).

Control Board. (Ex. 1031, p. 2.) The plain language of the MOU[11] is clear that possible future demolition is conditional on approvals of several other agencies, and is not dependent upon any particular outcome in the AEC proceeding. (Trust's Brief, p. 7.)

C. The Trust's Characterizations of the South Bay Replacement Project's Terminated Proceedings Are Legally and Factually Incorrect.

The Trust states that a "CEC attorney decision" in the South Bay Replacement Project proceeding supports its argument that demolition of the AGS is part of the AEC project. (Trust's Brief, pp. 7-8.) The Trust's characterization of the "CEC attorney decision" is factually inaccurate and legally incorrect. Some of the more egregious inaccuracies, which eviscerate the Trust's arguments, are discussed below.

The first problem with the Trust's characterization of the South Bay project is a factual omission. Unlike the Applicant in this case, the applicant for South Bay had a binding legal obligation to demolish the existing South Bay powerplant. Specifically, the South Bay applicant had an affirmative legal obligation to demolish the existing powerplant and return the land to the lessor, the Port of San Diego. As an "End of Term Action," the South Bay "Lessee shall decommission, dismantle and remove the Facility, and return the Facility Site to Lessor…." (Ex. 1073, p. 27.) The MOU between AEC and the City of Long Beach does not contain such an obligation.[12] (TN# 206920, *Memorandum of Understanding AES Alamitos, LLC and City of Long Beach* (Nov. 16, 2015) 13-AFC-01, docketed Dec. 10, 2015.)

[11] "The purpose of this MOU is to memorialize a) the voluntary commitment of AES to demolish the existing Alamitos Generating Station Units 1-6 ("AGS Units") when these facilities permanently cease operations and AES has received the applicable permits from City and approval from any other necessary authorities (the "Project")…." (Ex. 1031, p. 1.)

[12] The Trust's Exhibits unwittingly confirm the South Bay Applicant's affirmative obligation to demolish the old powerplant.:"…the existing plant is slated for demolition under agreements between its owner, the Port Authority." (Ex. 3012, p. 1.)

The fact that the demolition of the existing South Bay plant was an independent, affirmative legal obligation of the applicant in that proceeding is confirmed by the Trust's video exhibit showing that the existing South Bay Powerplant was demolished (as shown in the video proffered by the Trust, Ex. 3007.), even though the new South Bay powerplant was never certified by the Commission and built. Instead, the South Bay Replacement Project AFC was withdrawn and the AFC terminated in October of 2007.[13] But the demolition proceeded, with or, in this case, without, the new South Bay Replacement Project because the South Bay developer had an affirmative, legal obligation to demolish the facility.

In marked contrast to the South Bay project, the demolition of the existing AGS is not necessary, much less required, for construction of AEC on the new site. The AEC is on a separate site from the AGS. AEC will be constructed on an approximately 21-acre site within the larger 71.1-acre property of the existing AGS. (Ex. 1070, Project Description, p. 2.)

Significantly, the AEC has no lease-related obligations to demolish the existing powerplant. Moreover, as part of the ongoing phase out of Once-Through Cooling ("OTC") units, the existing AGS cannot be removed from service until the State Water Resources Control Board ("SWRCB"), California Independent System Operator ("CAISO"), and California Public Utilities Commission ("CPUC") confirm that the units are no longer needed. (Ex. 1072, p. 3.)

The Trust also mischaracterizes the letter from CEC Staff Counsel Arlene Ichien.[14] (Ex. 3012.) The document is not a legal "opinion" of the Commission as the Trust asserts. (Trust's Brief, pp. 1 and 6-7.) It is a letter to the Lessor, the Port of San Diego. The letter relies on the fact that the demolition of the existing powerplant is "part of a master plan to build a replacement plant," which "master plan" is predicated on the South Bay Applicant's affirmative

[13] See information at: http://www.energy.ca.gov/sitingcases/southbay/

[14] To begin, Ms. Ichien was an Assistant Chief Counsel, not Chief Counsel, as the Trust's Brief states. (*Id.*, p. 2.)

legal obligation to demolish the existing powerplant. There was no Commission decision on the South Bay AFC, and thus no Commission "opinion" or "rationale and precedent set in the South Bay Power Plant decision" that the Commission must follow.

The California Government Code provides a process by which an agency "may designate as a precedent decision a decision or part of a decision that contains a significant legal policy or policy determination of general application that is likely to recur." (Govt. Code § 11425.60.) A letter from the Assistant Chief Counsel is not a decision by the full Commission. Even assuming that the letter is treated as such, the letter was not designated "as a precedent decision" per the California Government Code, and therefore does not constitute legal precedent.

Moreover, even if Ms. Ichien's letter was used as a "precedent" for this proceeding, Ms. Ichien's letter supports the FSA's treatment of demolition. Ms. Ichien's letter states that "all foreseeable activities related to the proposed replacement powerplant will be covered in the Commission staff's environmental assessment." (Ex. 3012, p. 2.) This is precisely what the FSA does. It analyzes all foreseeable activities in its review of direct, indirect, and cumulative impacts. It is not at all certain that demolition will occur, which argues for demolition not being "foreseeable" at this time. Rather than declaring possible future demolition as not foreseeable, the FSA geos the extra step and examines demolition in its cumulative impacts analyses. This approach by Staff is, as Ms. Ichien's letter states, an examination of "all foreseeable activities related to the proposed replacement powerplant…covered in the Commission staff's environmental assessment." The Ichien letter supports Staff's analyses.

The possible future demolition of the existing AGS units is not required for AEC to advance and is, therefore, not a reasonably foreseeable consequence of the AEC project. However, because the demolition of the AGS units is arguably reasonably foreseeable at an

undetermined future date, it is reasonable to analyze potential cumulative impacts of the AGS demolition, as the FSA and the Applicant's Opening Testimony have done. (Ex. 1072, p. 3.) The Trust's arguments related to the South Bay proceeding are factually and legally incorrect and should be disregarded.

D. The Trust's Arguments that the SCAQMD Actions Support a Finding that Demolition of the Existing AGS Should Be Considered Part of the AEC Are Contrary to the Express Language In The Draft Permit to Operate.

The Trust argues that the South Coast Air Quality Management District's ("SCAQMD") draft Permit to Operate supports its argument that demolition of the existing AGS should be considered part of the AEC. (Trust's Brief, p. 8.) This is incorrect, as demonstrated by the express language of the draft permit.

The Trust asserts that the SCAQMD's "license requires the permanent retirement of AGS…Permanent decommissioning, as required in the AQMD permit, triggers the promises made by the Applicant in the MOU to demolish the AGS as soon as the proposed AEC is operational." (Trust's Brief, p. 8.) This assertion lacks any evidentiary or legal basis. The Trust continues to confuse and conflate (a) decommissioning, the operational shutdown of the existing AGS with (b) demolition, the possible future physical removal of the existing AGS. (Ex. 1072, p. 1.)

As demonstrated in the Permit to Operate for the AEC, demolition or even "permanent decommissioning" of the existing AGS is not required, as asserted by the Trust. Instead, the Permit to Operate provides for operational shutdown:

> Within 30 calendar days of actual shutdown but no later than December 29, 2019, AES shall provide SCAQMD with a notarized statement that Boilers Nos. 1, 2, and 6 are permanently shut down and that any re-start or operation of the boilers shall require new Permits to Construct and be subject to all requirements of

> Nonattainment New Source Review and the Prevention Of Significant Deterioration Program.[15]

A similar provision for operational shutdown is set forth for Boiler No. 3:

> Within 30 calendar days of actual shutdown but no later than December 31, 2020, AES shall provide SCAQMD with a notarized statement that Boiler No. 3 is permanently shut down and that any re-start or operation of the boiler shall require a new Permit to Construct and be subject to all requirements of Nonattainment New Source Review and the Prevention Of Significant Deterioration Program.[16]

Notably, both provisions provide only for the permanent shut-down of the boilers. Both provisions also provide for the re-start or operation of the boiler if a new permit is obtained, if, for example, the agencies overseeing the end of OTC do not allow the AGS to shut down on the currently contemplated compliance schedule. (Ex. 1072, p. 3.) The SCAQMD's approvals do not require demolition. Instead, they require shut down and provide a mechanism for the re-start or operation of the existing AGS.

Further, there is no language in SCAQMD's draft permit that would "trigger" the MOU between the City of Long Beach and the Applicant. There is no language in any SCAQMD documents that link the receipt of the SCAQMD permit to operate to any requirement to demolish the existing AGS. Therefore, the provisions of the SCAQMD's draft permit to operate are devoid of any support for the Trust's assertion that demolition of the existing AGS is part of the AEC.

[15] TN#: 214528, *Draft Facility Permit, Facility Permit to Operate AES Alamitos, LLC Section H: Permit to Construct and Temporary Permit to Operate*, p. 26 (Nov. 18, 2016).

[16] Id.

IV. THE CUMULATIVE IMPACTS ANALYSES CONDUCTED BY STAFF AND THE APPLICANT WERE THOROUGH AND CONSISTENT WITH CEQA.

A. Demolition of the Existing AGS is not a "CEQA" project and thus cannot contribute to a Cumulative Effect.

As explained in Section 15355 of the CEQA Guidelines, the cumulative impacts analysis focuses on "changes resulting from a single project or a number of separate projects." (14 C.C.R. § 15355(a).) As defined in Section 15378, "The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies." (14 C.C.R. § 15378(c).)

In this case, demolition of the AGS is not a "project" as defined by the CEQA guidelines because it is not an activity which will be subject to discretionary approval. CEQA defines a project as a discretionary agency action, and excludes ministerial actions. (Pub. Resources Code § 21080(b)(1).) Demolition of the AGS is not a "project" for the purposes of CEQA, as issuance of a demolition permit by the City of Long Beach is ministerial. (See, Long Beach Municipal Code Chapter 18.04.)

Because cumulative effects examine the potential combined effects of two or more "projects," the Commission was not required by CEQA to consider the cumulative impacts of activities, such as the demolition of AGS, which would be subject only to ministerial approval. If the Commission elects to include in its cumulative impacts analysis consideration of activities subject only to ministerial approval, such consideration is for informational purposes, but is not required by CEQA. .

B. No Applicable LORS Support the Trust's Contention that the Staff or Applicant Must Provide "Documentation" for the Potential Future Demolition, if Demolition Is Allowed and Does Occur.

The Trust provides no evidence to support its claim that the Applicant "can provide actual plans and data" regarding the demolition of the existing AGS. (Trust Brief, p. 9.) The

Applicant's testimony establishes that providing definitive information regarding demolition of the AGS in this proceeding is not possible. (For example, see Ex. 1031.) There are no definitive plans to demolish the AGS, and significant regulatory approvals and findings that must be made by the agencies overseeing the phase-out of Once-Through Cooling (SWRCB, CAISO, CPUC, and CEC, among others) before the powerplant can be shut down prior to demolition. (See, Ex. 1072.)

Although a timeline and the scope of any demolition are not known or knowable, the Trust's belief that there is no information regarding the potential environmental impacts from the demolition of the existing AGS is incorrect. (Trust's Brief, pp. 9-10.) When the AEC was originally proposed, demolition of the existing AGS was specifically included as part of the project because the AEC was going to be built where the existing AGS currently stands and demolition would necessarily precede construction of the new plant. (Ex. 1407, pp. 2-3.) Subsequently, the AEC was redesigned to be a smaller project, and additional land for the project acquired. (Ex. 1500, pp. 2-2 to 2-3.) Because of these and other improvements, the demolition of the existing AGS is no longer required. (Ex. 1500, pp. 2-2 to 2-3.) Nevertheless, an environmental analysis of the demolition of the existing AGS is part of the evidentiary record. (See, Exs. 1400-1472.)

V. THE ALTERNATIVES ANALYSES CONDUCTED BY STAFF AND APPLICANT WERE ROBUST AND CONSISTENT WITH CEQA.

Public Resources Code § 21002.1(a) requires a lead agency "to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." Alternatives are limited to those that (1) avoid or substantially lessen any of the significant effects of the project and (2) can feasibly attain most of the basic objectives of the project. (14 C.C.R. § 15126.6(c), (f).)

CEQA does not require an agency "to consider every conceivable alternative to a project", but to select "a range of project alternatives for examination" and "reasoning for selecting those alternatives." (14 C.C.R. § 15126.6.)

The Trust appears to argue that the Commission must consider "alternatives with less capacity than the 640 MW allowed in the CPUC decision," stating that "construction impacts and operation impacts from the AEC will be reduced by a smaller project." (Trust's Brief, pp. 21, 23.) However, the Trust has not presented any evidence identifying any significant impacts on the environment from construction and operation of the AEC at 1,040 MW that would be avoided or substantially lessened by consideration of an alternative with a generating capacity less than 640 MW. (See, Exs. 3004, 3008, 3009.) Therefore, there is no basis to analyze such an alternative.

The Trust claims that energy efficiency, demand response, and battery storage should be considered "adequate substitutes" for the AEC. (11/15 RT 35: 8-11.) However, the substantial evidence in this proceeding demonstrates that there are no significant effects from the AEC. (Ex. 2000, pp. 1-6 to 1-7; see also, Ex. 1406, p. 1-5.) Therefore, the Trust has failed to show that its proposed "adequate substitutes" would lessen or avoid any significant impact.

A. Substantial Evidence In The Record Confirms That There Are No Feasible Alternatives That Satisfy Most Of The Basic Project Objectives.

Section 15126.6(a) of the CEQA Guidelines requires the reviewing agency to examine "a range of reasonable alternatives to the project, or to the location of the project, *which would feasibly attain most of the basic objectives of the project."* (Emphasis added.) To be feasible, an alternative must be "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors. (14 C.C.R. § 15364.)

The Trust asserts that demand response, in addition to other "tools" such as the La Paloma generating facility are "available in combination to meet the need" served by the AEC. (Trust Brief, pp. 22-34.) However, the ability of the necessary unspecified "combination" of these tools to meet the project objectives of the AEC is entirely speculative, as the Trust has cited no evidence that these "tools" can be procured in exactly the right locations, at the right levels, with the right electrical characteristics needed to serve local area reliability needs.

For example, the Trust's testimony states that the La Paloma facility is "soon-to-be-mothballed." (Ex. 3009, p. 4). Even if this was true, the Trust has cited no evidence that the La Paloma facility has the present ability to provide needed generating capacity in the Western subarea of the Los Angeles Basin, possess the necessary operating permits, or if the right "combination" can determined and accomplished in a successful manner within a reasonable period of time. (Ex. 1070, p. 6.) In short, the Trust's has failed to prove that its proposed substitutes are feasible and meet the basic project objectives for the AEC.

VI. NEARLY TWO DECADES AGO, THE LEGISLATURE REPEALED THE COMMISSION'S AUTHORITY TO CONSIDER "NEED" IN AN AFC PROCEEDING

The Trust contentions regarding the "need" for the AEC are irrelevant to this proceeding. In fact, the Legislature has spoken, and repealed the Commission's statutory authorization to consider and make a determination of "need" in an AFC proceeding.

In 1999, the Legislature amended the Warren-Alquist Act to remove the requirement that an "Integrated Assessment of Need" be performed in an AFC process. As explained by the Commission in September of 2001, the Commission cannot consider "need" in evaluating a merchant powerplant:

> Prior to January 1, 2000, the Public Resources Code directed the Commission to perform an "integrated assessment of need," taking

> into account 5 and 12-year forecasts of electricity supply and demand, as well as various competing interests, and to adopt the assessment in a biennial electricity report. In order to grant a license, the Commission was required to find that a proposed power plant was in conformance with the adopted integrated assessment of need for new resource additions. [Pub. Resources Code, §§ 25523 (f) and 25524 (a).] Effective January 1, 2000, Senate Bill 110 (Stats. 1999, ch. 581) repealed Sections 25523 (f) and 25524 (a) of the Public Resources Code, and amended other provisions relating to the assessment of need for new generation resources. Specifically, this legislation removed the requirement that the Commission make a finding of need conformance in a certification Decision. (CEC Final Decision, Metcalf Energy Center, September 2001, CEC publication number P800-01-023.)

The Commission also clearly articulated the Legislative intent to remove the assessment of "need" from the AFC process:

> Senate Bill (SB) 110 states in pertinent part: 'Before the California electricity industry was restructured, the regulated cost recovery framework for powerplants justified requiring the commission to determine the need for new generation, and site only powerplants for which need was established. Now that powerplant owners are at risk to recover their investments, it is no longer appropriate to make this determination. (Pub. Resources Code, § 25009, added by Stats. 1999, ch. 581, § 1.)' (Id.)

Thus, since January 1, 2000, it has been the law that the Commission's certification of a project is not subject to a determination of "need."

The Trust argues at length about the "need" for AEC, attacking in succession its view on the "need" for 1,040 MWs versus the "need" for 640 MWs of need capacity. (Trust's Brief, pp. 18-21.) These arguments are all aimed at trying to claim some insufficiency in the Alternatives analyses for the AEC.

Yet, as a matter of law, "need" is irrelevant to any decision the Commissions must make on this AFC. The Legislature repealed the requirement to conduct an Integrated Assessment of Need for merchant powerplants, effective January 1, 2000, nearly seventeen years ago.

Accordingly, the Trust's arguments about "need" are irrelevant and must fail.

VII. NEITHER THE WARREN-ALQUIST ACT, CEQA, NOR ANY OTHER STATE LAW PROVIDES ANY LIMITATIONS ON THE GENERATING CAPACITY OF THE AEC.

The Trust asserts, without citation to any authority, that the CPUC decision authorizing SCE to procure 640 MWs from the AEC to meet SCE's local resource adequacy requirement, is actually a LORS dictating the maximum generating capacity "for this specific facility" that can be approved by the Commission. (Trust's Brief, p. 24.) The Trust further asserts that "licensing 1040 megawatts" would therefore be inconsistent with what the Trust has defined as a "LORS." (Trust's Brief, p. 24.) These assertions are false.

In Decision 15-11-041 (Application 14-11-012), the CPUC authorized procurement consistent with the results of Southern California Edison's Request for Offers for the Western LA Basin, including the AEC.[17] That decision expressly rejected the Trust's argument that the CPUC cannot approve a contract until the Commission completes its environmental review of the project.[18] The CPUC decision held that the CPUC contract approval process and the Commission's site certification process were independent and distinct.[19]

There are only two requirements in the Warren-Alquist Act as to the type of projects that can seek certification from the Commission. (Pub. Resources Code §§ 25500, 25110, 25120.) First, the project must be a thermal powerplant. (Pub. Resources Code §§ 25500, 25110.) Second, the thermal powerplant must have a generating capacity of 50 MWs or more. (Pub. Resources Code §§ 25500, 25110, 25120.) The AEC meets both requirements. (See, Ex. 1500.)

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[17] See, D.15-11-041 (A.14-11-012), available at: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M156/K064/156064924.PDF .

[18] D.15-11-041 (A.14-11-012), mimeo pp. 29-30.

[19] Id.

The Commission has specifically and correctly ruled that the approval of an application for certification is not dependent upon the existence of a power purchase agreement ("PPA") approved by the CPUC. In its Decision approving the Carlsbad Energy Center, the Commission ruled that possession of a PPA "to sell a facility's generation is not a prerequisite for approval of an Energy Commission license to construct the facility…the Energy Commission and the CPUC, make complementary decisions regarding powerplants, subject to different standards. No law or rule requires that the Energy Commission approve only the capacity for which the CPUC has approved contracts. The bidding for those contracts will be more competitive—to the ratepayers' benefit—if more shovel-ready projects are available to compete."[20] Therefore, the Trust's argument that the proposed generating capacity of the AEC is inconsistent with LORS is unfounded, and must be disregarded.

VIII. THE LOADING ORDER ALLOWS FOR THE USE OF CLEAN AND EFFICIENT FOSSIL-FIRED GENERATION LIKE AEC, WHICH THE CPUC HAS DETERMINED AND THE CALIFORNIA SUPREME COURT AFFIRMED.

The Trust contends that the Alternatives analysis must adhere to the "loading order" as an applicable LORS, which the Trust in turn argues affects the Alternatives analyses for AEC. These contentions reflect Trust's fundamental misunderstanding of the loading order and how it was implemented in relation to AEC.

The loading order was initially conceived in California's 2003 Energy Action Plan ("EAP I"), and jointly adopted by the CEC, CPUC and the California Power and Conservation Financing Authority. As stated in EAP I, the additional clean, fossil fuel, central-station generation is consistent with the loading order:

[20] TN# 205625, Carlsbad Amendment Final Commission Decision (07-AFC-06C), Publication CEC-800-2015-001 CMF, pp. 3-6.

> The Action Plan envisions a 'loading order' of energy resources that will guide decisions made by the agencies jointly and singly. First, the agencies want to optimize all strategies for increasing conservation and energy efficiency to minimize increases in electricity and natural gas demand. Second, recognizing that new generation is both necessary and desirable, the agencies would like to see these needs met first by renewable energy resources and distributed generation. Third, because the preferred resources require both sufficient investment and adequate time to "get to scale," *the agencies also will support additional clean, fossil fuel, central-station generation*. Simultaneously, the agencies intend to improve the bulk electricity transmission grid and distribution facility infrastructure to support growing demand centers and the interconnection of new generation.[21]

Significantly, the loading order expressly recognizes the need for clean and efficient natural gas generation. Energy Action Plan II ("EAP II," issued October 2005)[22] similarly endorsed the loading order, and acknowledged that "to the extent efficiency, demand response, renewable resources and distributed generation are unable to satisfy increasing energy and capacity needs, *we support clean and efficient fossil-fired generation*."[23]

In CPUC Decision 15-11-041 (November 19, 2015, Trust Brief attachment TN #: 214629-3), the CPUC expressly found that the projects approved in response to the "Local Capacity Requirements Request For Offers For The Western LA Basin" were procured consistent with the loading order. (*Id*., p. 35, Finding of Fact 14). The issue of loading order conformity has been decided.[24]

The CPUC also rejected the same arguments that the Trust Witness, Mr. Powers, makes to this Commission. Before the CPUC, Mr. Powers made virtually all of the same claims he seeks to relitigate here related to the procurement of gas-fired generation ("GFG"):

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[21] EAP I (http://www.energy.ca.gov/energy_action_plan/2003-05-08_ACTION_PLAN.DOC) at 3; emphasis added.

[22] EAP II (http://www.energy.ca.gov/energy_action_plan/2005-09-21_EAP2_FINAL.DOC).

[23] EAP II at 2; emphasis added.

[24] The loading order is a policy directive. It is not an applicable law, ordinance, regulation or standard for the Commission's approval of an AFC.

> Powers Engineering also objects to the amount of GFG contracted by SCE. [Powers argues] [t]his choice will result in higher GHG emissions and pollution than the status quo, and goes against the Commission's prior decisions directing procurement that reduces GHG emissions. The GFG chosen for Huntington Beach and *Alamitos* will produce over 4 million tons per year of GHG emissions based on the usage rates modeled by SCE. These units replace low emission OTC units and zero-emission SONGS. This will also be a much larger increase than if SCE had chosen combustion turbine peaker technology. *Choosing these combine cycle GFG plants thus violates the Loading Order*. Powers Engineering also notes that the lack of demand growth in the Western LA Basin is a changed circumstance that did not exist in 2013 when D.13-02-015 was finalized. Decision 15-11-041 at 27. [Footnotes omitted].

The CPUC rejected Mr. Powers' GHG, loading order and other arguments. Instead, the CPUC found that the procurement of AEC (and the Huntington Beach Energy Project) is consistent with the loading order: "We agree with SCE." (Id.)

The California Supreme Court also agrees that the claims made by Mr. Powers and the Trust related to the CPUC's procurement approvals are without merit and must be rejected. On November 30, 2016, the California Supreme Court denied the petition filed in *Powers Engineering v. P.U.C. (Southern California Edison Company)*, Case Number S237487.[25] As decisions from the California Supreme Court and the United States Supreme Court involving this Commission and the CPUC confirm, the California Supreme Court's denial is a final, non-appealable decision on the merits.[26]

Given that the issues raised by Mr. Powers have already been decided by the CPUC and the California Supreme Court, the Staff's FSA Part 1's Alternatives analysis properly does not

[25] Available on the California Supreme Court website at: http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc_id=2156147&doc_no=S237487

[26] *Santa Teresa Citizen Action Group v. State Energy Resources Conservation and Development Commission* 105 Cal.App.4th (2003) 1441, 1449 [130 Cal.Rptr.2d 392]; *Napa Valley Elec. Co. v. Railway Commissioners of California* (1920) 251 U.S. 366, 369-372 [40 S.Ct. 174].

revisit the question of AEC in relation to the loading order or other matters advocated by the Trust. AEC is completely consistent with both EAP I and EAP II loading order and the CPUC's Decision 15-11-041.

IX. THE LA PALOMA PROJECT CANNOT SATISFY ANY OF THE BASIC PROJECT OBJECTIVES.

The Trust suggests that the existing La Paloma facility located in Kern County could be an alternative to the AEC. (Trust's Brief, p. 22.) However, La Paloma cannot satisfy any of the basic objectives of the AEC.

As to AEC's first basic project objective, the La Paloma Project is not electrically equivalent to the AEC. AEC will provide energy, generating capacity, and ancillary electrical services (voltage support, spinning reserve, inertia) to satisfy Los Angeles Basin Local Reliability Area requirements and transmission grid support, particularly in the western subarea of the Los Angeles Basin. (Ex. 1070, p. 3.) Southern California Edison is the load serving entity that serves the western subarea of the Los Angeles Local Reliability Area. (See, Ex. 1500, p. 6-2.) La Paloma is located in McKittrick, Kern County, California, approximately 40 miles west of Bakersfield, California, in Pacific Gas and Electric's ("PG&E") service territory, a completely separate load serving entity. (Ex. 1072, p. 5.) La Paloma is electrically unable to satisfy the basic objectives of AEC. (Ex. 1072, p. 5.)

Second, La Paloma would not be able to provide fast starting and stopping, flexible, controllable generation with the ability to ramp up and down through a wide range of electrical output. (Ex. 1072, p.5.) It is unclear from Mr. Power's testimony whether this older vintage combined-cycle unit can provide these flexible capacity services. (*Id.*) The "PMin" operating level is the lowest output for a facility to operate reliably. (*Id.*) Operating at a low PMin allows a facility to ramp up to provide grid stability as the output from intermittent resources drops. (*Id.*)

According to Mr. Power's testimony, La Paloma would have to be modified to reduce its PMin heat rate, but the nature, scope, and costs of these proposed modifications are not explained. (*Id.*) In contrast, there is no question that AEC can provide fast starting and stopping, flexible, controllable generation with the ability to ramp up and down through a wide range of electrical output. (*Id*.)

Third, the La Paloma site would not satisfy the objective to use the Applicant's existing brownfield power plant site and infrastructure and the administration, maintenance, and certain warehouse buildings. La Paloma is owned by another entity at another site in Kern County. (*Id*.)

Fourth, the La Paloma site would not meet the basic objectives related to the SCAQMD's Rules. La Paloma, located in PG&E's service territory in Kern County, is outside the boundaries of the SCAQMD. (*Id*., p. 6.)

La Paloma may also be infeasible. The Trust's Exhibit 3019 is a complaint by La Paloma against the CAISO wherein La Paloma argues it needs $39 million to cover just five months' worth of losses. On its face, the Exhibit calls into question La Paloma's economic viability and longevity. La Paloma is a wet cooled powerplant relying on California Aqueduct water as its supply. (Ex. 1070, p. 6.) Mr. Power's testimony does not address the water supply certainty for the facility or the potential costs and time associated with converting the facility to dry cooling, if desired or if directed. (Ex. 1072, p.5.)

X. DEMAND RESPONSE ALONE OR IN A "PORTFOLIO" WITH LA PALOMA CANNOT PROVIDE THE RELIABILITY BENEFITS OFFERED BY THE AEC.

Demand response is a valuable tool, but demand response alone will not provide electric reliability to the western subarea of the Los Angeles Basin. (Ex. 1072, p. 6.) Demand response will not provide fast starting and stopping, flexible, controllable generation. (*Id*.) Demand response will not utilize the existing brownfield powerplant site and infrastructure. (*Id*.) And

demand response will not allow for the replacement of older, less-efficient electric utility steam boilers with specific new generation technologies consistent with the SCAQMD Rules. (*Id.*)

Similarly, a portfolio approach of Demand Response plus the Paloma project, as proposed by Mr. Powers (Ex. 3009, p. 4) would not satisfy most of the basic objectives for the AEC. (Ex. 1072, p. 6.) This combination of demand response and La Paloma will not provide electric reliability to the western subarea of the Los Angeles Basin, given La Paloma's location in Kern County; will not provide fast starting and stopping, flexible, controllable generation to the western subarea of the Los Angeles Basin; will not utilize the existing brownfield powerplant site and infrastructure; and will not allow for the replacement of older, less-efficient electric utility steam boilers with specific new generation technologies consistent with the SCAQMD Rules. (*Id.*)

XI. THERE IS NO EVIDENCE OF A "PORTFOLIO" OF PREFERRED RESOURCES THAT WOULD BE A VIABLE ALTERNATIVE TO AEC.

The Trust questioned why the Staff's FSA did not analyze a "portfolio" of Preferred Resources. (Trust's Brief, pp. 22-23; 11/15 RT 68-69.) The answer is threefold.

First, an alternatives analysis need not consider every conceivable alternative, including those conceived of on cross examination. (14 C.C.R. § 15126.6(a).)

Second, the Commission should examine alternatives that avoid or substantially lessen the significant impacts from the project. The Trust has not identified any significant impacts that would be avoided by its imaginary portfolio.

Third, the Trust has not clearly explained or defined the imaginary portfolio:

- Is this a portfolio made up of existing Preferred Resources? The use of existing Preferred Resources in a portfolio is nothing more than the "No Project Alternative" that foregoes the benefits of the AEC, and the record

contains a robust discussion of the No Project Alternative. (See, Ex. 1500, pp. 6-3 to 6-5; Ex. 2000, pp. 6-20 to 6-22.)

- Is this imaginary portfolio made up of new resources? If so, the sites for these new Preferred Resources are not identified, which makes them speculative at best. The Trust has the burden of producing evidence on its proposed alternatives it advocates: "Any party or person may propose that the commission approve any alternative site and related facility in lieu of or in addition to the applicant's proposals. *The proponent of such alternative siting proposal has the burden of presenting evidence to establish the suitability and acceptability of such proposal as set forth in subsection (a) of this section*.* * *" (20 C.C.R. § 1723.5 (e).) The Trust has not carried this burden. It has not identified specific projects in specific locations -- only a cross-examination concept.

With respect to potential environmental impacts, the Trust cannot simply assume away the potentially significant impacts of its portfolio of new Preferred Resources. The Trust must proffer evidence that its imaginary portfolio would not result in any significant impacts. The Trust offered no such evidence.

The Trust must proffer evidence that its imaginary portfolio would be able to comply with applicable LORS. The Trust offered no such evidence.

CEQA's Alternatives analysis requires specificity in the examination of potentially significant effects and LORS compliance. The Commission's regulations place the burden of producing evidence to support its imaginary portfolio concept on the Trust. (20 C.C.R. § 1723.5 (e).) The Trust failed to satisfy this burden. There are many unanswered questions and,

significantly, no evidence in the record on the portfolio of preferred resources – only an undefined portfolio concept.

XII. THE AEC IS LOCATED ON A BROWNFIELD SITE, NOT AN "ESTUARY".

The Trust states that the Commission's regulations require the PMPD to make special "findings" relating to "estuaries in an essentially natural and undeveloped state."[27] The Trust is incorrect in two respects.

First, the Trust relies on a since-repealed regulatory provision, Section 1752(f)(5), to argue that specialized findings must be made. Section 1745.5 of the Commission's regulations now governs what should be included in the Presiding Members Proposed Decision. As to estuaries, Section 1745.5(b)(7) provides:

> (7) for sites in state, regional, county or city parks; wilderness, scenic, or natural reserves; areas for wildlife protection, recreation or historic preservation; natural preservation areas in existence as of January 7, 1975; or estuaries in an essentially natural and undeveloped state: an analysis of whether the facilities will be consistent with the primary land use of the area, and of whether the approval of the public agency having ownership or control of the land has been obtained, whether or not such approval is subject to preemption under Public Resources Code section 25500.

Section 1745.5 does not apply in this proceeding because the site is not located in a state, regional, county or city park; wilderness, scenic, or natural reserve; areas for wildlife protection, recreation or historic preservation; natural preservation areas in existence as of January 7, 1975; or estuary in an essentially natural and undeveloped state. (*Id*.) Instead, the AEC is located on a brownfield site in an industrial area, which has been developed and used for industrial purposes since the 1950s. (Ex. 1406, p. 101; Ex. 1067; Ex. 1416, pp. 5.6-7 through 5.6-18; and Ex. 1413, p. 5.3-16.)

[27] Trust's Brief, p. 23, citing to 20 C.C.R. § 1752(f).

Second, even though no special findings or analysis is required because the AEC is located on a brownfield site, both the Applicant and Staff thoroughly analyzed any potential impacts to the resources at the Los Cerritos Wetlands and found that there are no significant impacts. (For example, see Ex. 1070, p. 19; Ex. 2000, pp. 4.2-5, 4.2-8, 4.2-26 to 36.)

XIII. CONCLUSION

The AEC is the right project in the right location. The AEC will provide needed reliability in the transmission constrained western Los Angeles Basin Local Reliability Area. The Commission should approve the AEC.

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