

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

In the Matter of:
The Application for Certification
for the **CHULA VISTA ENERGY
UPGRADE PROJECT**

Docket No. 07-AFC-4

**PREHEARING CONFERENCE STATEMENT OF INTERVENOR
CITY OF CHULA VISTA
SCOTT TULLOCH, ASSISTANT CITY MANAGER
September 16, 2008**

DOCKET

07-AFC-4

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I. Introduction

The City of Chula Vista is very pleased whenever a business selects the City as the location to make an important investment, and takes its participation in processing that project very seriously. That is particularly true when that investment potentially contributes to energy reliability, when that investment rises to a value of 80 million dollars and when the City and its residents are in the midst of such challenging economic times. The City is equally if not more serious about its duty to protect the public's health, environment and general quality of life and those laws, ordinances and rules established to implement those all important objectives.

The City has worked to make it very clear that it has relied extensively on the independent analysis conducted and data provided by the California Energy Commission (CEC) Staff, consultants and cooperating agencies to participate in the CEC's process. That became even more critical on more "Topics" when the CEC denied the City's request for funding its participation in the process. The City continues to review all documents and participate in every workshop, conference, hearing and public event in an effort to provide an open, transparent and inclusive process that best represents the interests of Chula Vista residents and businesses. The following is intended to provide an initial response to both the Pre-Hearing Conference Notice and the Hearing Adviser's email of Friday, September 12, 2008.

II. Topic Areas That Are Complete and Ready to Proceed to Evidentiary Hearings

The City agrees that the following topic areas are complete and ready to proceed to evidentiary hearing subject to issues raised by other parties. The City reserves its opportunity to address the issues presented by those parties, examine new evidence and/or cross-examine any witnesses sponsored by those parties:

- | | |
|--|----------------------------------|
| 1. Cultural Resources | 6. Facility Design |
| 2. Hazardous Materials | 7. Waste Management |
| 3. Soil and Water Resources | 8. Facility Design |
| 4. Traffic and Transportation | 9. Geology and Paleontology, and |
| 5. Transmission Line Safety and Nuisance | 10. Power Plant Efficiency |

Topic Areas That Are Not Complete

- | | |
|---|--|
| 1. Air Quality
(Exhibit A - Jones & Stokes Letter) | 6. Visual Resources |
| 2. Biological Resources | 7. Worker Safety |
| 3. Noise and Vibration | 8. Power Plant Reliability |
| 4. Public Health | 9. Transmission System Engineering
(Exhibit B - CAISO Letter) |
| 5. Socioeconomic | 10. Biological Resources |

Topics Areas That Remain Disputed

1. Land Use – (Ramco Special Use Permit documents-Exhibit C)
2. Alternatives

Sponsored Witnesses

The City does not intend to sponsor any witnesses at this time.

Witness Cross Examination

The City wishes to cross-examine the expert representatives from the agencies that have supplied evidence to the CEC and/or the Applicant as part of the Assessment Process, the: CAISO; Gary DeShazo, Director Regional Transmission North, and Ali Chowdhury, Director Regional Transmission South, SD Air Pollution Control District; John Annicchiarico, Senior Air Pollution Control Engineer, and Arthur Carbonell, Associate Air Pollution Control Engineer, and the Chula Vista Elementary School District (Michael Slavik, Senior Air Quality Specialist, ICF Jones & Stokes). The City also wishes to cross-examine the CEC consultants/Staff that worked on the Topics listed above that are not complete and/or remain in dispute. The City further asks that the CEC make those individuals available. The City anticipates that it will need 5-10 minutes at most for each incomplete items above, except Transmission, for which the City requests up to 15-20 minutes. The City anticipates that up to 20-30 minutes may be needed for each Topic that remains in dispute.

A List of Identifying Exhibits

Exhibit A; Jones & Stokes Letter, Chula Vista Elementary School Consultant
Exhibit B; CAISO, California Independent System Operator Letter
Exhibit C; RAMCO, Special Use Permit-Existing Facility
Exhibit D; MMC/City Agreement & Recommendations for Additional Conditions of Approval

The Reason that the City Believes Some Topics Are Not Complete

Air Quality and Public Health. There are comments made by the City, Applicant and other parties that have either not been incorporated into the FSA as requested or have not been addressed in a public setting including but not limited to the City and Applicant's request to incorporate mutually agreed upon measures into the Certification as conditions of approval.

Biological Resources. CEC staff has addressed a majority of the City's comments on the Biological Resources section of the PSA for the Chula Vista Energy Upgrade Project (CVEUP). However, please note that compliance with City's Multiple Species Conservation Program (MSCP) Subarea Plan for the proposed laydown area(s) was not adequately addressed and several comments included in the City's letter dated June 13, 2008 related to the biological resources section were overlooked. At this time, City staff has determined that the remaining issues still need to be addressed:

1. Under the City's MSCP Subarea Plan, development in areas mapped as 75-100% Conservation Area is permitted but limited to no more than 25% of the mapped conservation area, thus assuring a minimum conservation level of 75% as Preserve land. Therefore, in order for the project to be consistent with the City's MSCP Subarea Plan, use of either laydown area must be limited to 25% of the parcel and the remaining 75% will be conserved as Preserve land. Although CEC staff has indicated that the site has been previously disturbed and no sensitive habitat will be impacted, use of the parcel must still be limited to 25% of the land in order to ensure no further disturbance to the site and the habitat immediately adjacent to the site.
2. Please be reminded that the proposed project and laydown area(s) are located adjacent to habitat protected under the MSCP. Additionally, the City has a Municipal Permit and other storm water runoff standards currently in place. To ensure potential runoff from the project and/or laydown area(s) will not indirectly impact the habitat adjacent to the site and the proposed BMPs identified in the FSA meet the City's runoff standards, the City's Engineering Department should have an opportunity to review and approve the proposed BMPs for the project.

In order to demonstrate compliance with the City's MSCP Subarea Plan, these comments must be addressed to the satisfaction of the City. City staff is willing to assist CEC staff in addressing these comments.

Noise and Vibration. Pg. 4.6-13 – Noise: The CEC staff states that they do not know where the 3dBA increase in ambient noise threshold stems from for determining a noise impact. The City's General Plan EIR does note that a 3dBA increase is discernable to the reasonable ear. The 3dBA increase, as a threshold is a standard used throughout the State as referenced in:

Bolt, Beranek, and Newman, Inc., 1973 Fundamentals and Abatement of Highway Traffic Noise. Prepared for the Federal Highway Administration. Report No. PB-222-703. June.

Beranek, Leo L., editor, 1988 Noise and Vibration Control. Institute of Noise Control Engineering, Washington, D.C.

CEC staff provides no justification for the use of a 9dBA increase in the ambient noise level as the threshold. According to our General Plan EIR, an increase in 10 dBA is perceived as a doubling of noise, which far exceeds our typical threshold. City staff is willing to assist CEC staff in addressing these comments.

Socioeconomic Resources. There are comments made by the City, Applicant and other parties that have either not been incorporated into the FSA as requested or have not been addressed in a public setting including but not limited to the City and Applicant's request to incorporate mutually agreed upon measures regarding the Utility User's Tax into the Certification as conditions of approval.

Worker Safety. There are comments made by the City, Applicant and other parties that have either not been incorporated into the FSA as requested or have not been addressed in a public setting including but not limited to the City Fire Department's Design Mitigation Plan by Worley-Parsons and the secondary gate access.

Visual Resources. The City wants to verify that the CEC staff has fully analyzed and addressed the potential impacts through VIS 1-3 prior to responding to the CEC's request of the City regarding Land Use, Zoning and General Plan issues.

Power Plant Reliability and Transmission Engineering. The City wishes to verify that the CEC staff adequately analyzed these issues and accurately interpreted the CAISO submitted statements when it cites and/or relies on them in the Assessment Process relative to the incomplete or disputed Topics.

The Reason that the City Believes Some Topics Remain In Dispute

Land Use and Alternatives. The Committee has identified these Topics as an area of concern and "directed" the participating parties to be prepared to discuss them and other matters specified in the Notice. Additionally, CEC staff and the Committee make reference in the Assessment process to the City's responsibility to resolve inconsistencies identified in the CEC's CEQA like process, for which the City is not the lead, not an expert, and reminded the CEC that the City is not adequately resourced to provide under the economic challenges the City currently faces.

Proposals for Briefing Deadlines

The Chula Vista Fire Department has requested a few additional days to review the Fire Design Plan and the proposed secondary gate issue. The City is requesting less than a week of additional time and will be prepared to work with the Committee, Hearing Adviser and all Parties to schedule the Evidentiary Hearing as promptly as all the Parties schedules allow.

Background

The opening comment of the Final Staff Assessment states that,

“The Energy Commission staff has the responsibility to complete an independent assessment of the project’s engineering design and its potential effects on the environment, the public’s health and safety, and whether the project conforms to all applicable laws, ordinances, regulations and standards (LORS).”

The CEC goes on to say that the City did not provide the CEC with an analysis of the project’s consistency with the General Plan. The City has invested hundreds of hours reviewing Commission documentation, preparing reports, providing the CEC with documentation and responding to public document requests triggered by the CEC process. The City’s budget and extension requests during the process have both been denied. The City has continued to stay engaged and provide the best support it can under the circumstances. The City has also consistently made it clear that it is relying on the CEC and other agencies such as the APCD to provide the research and data on which the City bases its comment and limited analysis.

The City would like the Committee to know that it was the City that initiated contact with the CEC policy and legal staff to determine which jurisdiction appropriately had responsibility for processing the Application for this project. The City agreed with the CEC’s interpretation of the Warren Alquist Act and agreed that the Application was clearly more than 49mW and should be processed by the CEC. The City notified the applicant and though they voiced disappointment, they promptly withdrew the application from the City and re-submitted a revised application to the CEC several months later.

Early in the CEC process, October 1, 2007, the Commission distributed a notice requesting agency participation and offered reimbursement to local government for their participation. The City promptly contacted the CEC and requested reimbursement, explaining the City’s inability to provide thorough and timely support while losing key employees in the Planning and Legal departments (50% or more of each Department). Despite the City’s financial hardship it continued to actively participate in good faith while it waited for a response. CEC staff contacted the City and requested a budget. The City submitted a budget with the understanding that it would receive some level of funding and continued to participate in good faith without a response. The City subsequently filed for Intervener status. The City was later told that its budget request was denied in total, but that it could “potentially” be reimbursed for work specifically

directed by the CEC. The CEC staff continued to contact the City's project management staff and department staff directly to request assistance.

Although the City recognizes that it has not always provided the specific analysis or answers the CEC staff may want, the City has provided documents and answered questions as many times as the CEC staff or consultants have requested them and provided analysis when it could. The City has also continued to participate in every activity sponsored by the CEC and the Applicant and promptly communicated with the CEC or its delegate whenever contacted. Significant portions of the City's response to the CEC's requests have been used to make corrections and provide clarity to the Staff Assessment documents. That includes a repeated request by the City to clarify the CEC statements that there was a contract between the applicant and the public utility for the new facility's output.

Sometimes, the information provided by the City has not been included even when the City has as directed by the CEC, worked with the applicant to establish mutually agreeable resolution and has subsequently accomplished that challenging task. As an example, the City had repeatedly brought some specific issues to the CEC's attention regarding errors or omissions in the Socioeconomic Section of the PSA and FSA including but not limited to local tax obligations such as the Utility User's Tax. Although the City submitted a written mutual agreement with the Applicant regarding the issue, (Exhibit D) CEC staff has chosen to ignore the City's long-standing interpretation of its own local Ordinance. In the FSA, CEC staff recites a portion of the City's Municipal Code that exempts a component of the public utility's operation and declares the for profit independent applicant exempt, and therefore seemingly a public utility. CEC staff provides no statute or justification for finding that the applicant has the same standing as SDG&E.

In another section, the FSA goes on to say that; "Therefore, staff [CEC] has conducted a consistency analysis of the applicable City land use LORS without the benefit of the City's own interpretation of those LORS. That is not entirely accurate. City staff has repeatedly included its "interpretation" of LORS and even obtained the Applicant's concurrence in writing on some issues and submitted it to the CEC only to have it rejected without explanation by the FSA, i.e. UUT tax provision (Exhibit D). With regard to Land Use, the City has consistently asserted that it needs the time, resources and appropriate documents before making its comment. The City's request for an extension to review documents prior to the PSA workshop was denied. The City also thought it important to have time to review the APCD report prior to commenting on the Public Health, Air Quality and Land Use sections, particularly when the CEC staff placed significant emphasis on the "toxic emitter" reference in the General Plan, but that extension was denied.

The City is not an expert on the CEC's CEQA like process, does not have the authority as the Lead agency to determine the volume or timing of assignments or the budget control the CEC has to fund its participation. The City has provided extensive documentation regarding the General Plan and Zoning issues relative to the Application and affected parcel. The City has also provided access to any information the CEC has

requested and should need as the “Lead” agency to make the determination it feels is appropriate.

As directed by the Commission, the City has worked with the Applicant to develop six mutually agreed upon measures that it believes will address the community’s primary issues (Exhibit D). One measure was included as a condition in the FSA. The City reiterates the Applicant and City’s request that the remaining measures be included as conditions of approval. The City will participate fully in the Pre-hearing Conference and will be prepared to discuss the issues as directed by the Hearing Adviser in the September 12, 2008 email. The City respectfully requests that at the Pre-Hearing Conference the Committee also provide the City and Applicant with a clear indication of whether or not the Commission intends to accommodate their request to incorporate these measures as conditions of approval. The City will also participate at the Evidentiary Hearing and use whatever resources are provided to respond as precisely as possible to the issues established at the Pre-hearing Conference.

The City of Chula Vista appreciates the excellent communication and exemplary effort put forth by the Project Manager. The City is also very grateful for the CEC’s leadership and partnership in projects over the years to advance the cause of clean, renewable, affordable and reliable energy in Chula Vista and throughout California. We look forward to participating in the Pre-Hearing Conference and Evidentiary Hearing, and completing this process in that same spirit and in as timely a fashion as possible for the community, the Commission and the Applicant.

CC: Mayor and Council
Michael T. Meacham, Director
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STATE OF CALIFORNIA

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Docket No. 07-AFC-4

PROOF OF SERVICE
(Revised: 7/14/08)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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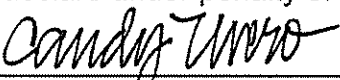
DECLARATION OF SERVICE

I, Candy Uvero, declare that on September 16, 2008, I deposited copies of the attached PREHEARING CONFERENCE STATEMENT OF INTERVENOR FOR THE CITY OF CHULA VISTA, Docket No. 07-AFC-4, in the United States mail at Chula Vista, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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



Candy Uvero