

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

Application for Certification for the
Mirant Willow Pass Generating Station Project

Docket No. 08-AFC-06

DOCKET	
08-AFC-6	
DATE	<u>Nov 21 2008</u>
RECD.	<u>Nov 24 2008</u>

**APPLICANT'S RESPONSE TO CITY OF PITTSBURG
ITEMIZED BUDGET AND REQUEST FOR REIMBURSEMENT**

November 21, 2008

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Pursuant to Section 1715 of the regulations of the California Energy Commission ("Commission"),¹ Mirant Willow Pass, LLC, the applicant in this proceeding ("Mirant Willow Pass"), submits this response to the Itemized Budget and Request for Reimbursement filed by the City of Pittsburg ("City") on November 7, 2008 ("Budget Request").

In addition to filing its Budget Request, the City has asked Mirant Willow Pass to enter into a reimbursement agreement that covers, among other things, the fees, costs and expenses that the City expects to incur in connection with its review and analysis of the Application for Certification ("AFC") for the Willow Pass Generating Station ("WPGS"). Mirant Willow Pass has discussed a form of reimbursement agreement with the City and on October 31, 2008, the due date requested by the City, Mirant Willow Pass submitted proposed revisions to the City's initial draft. Mirant Willow Pass has not yet received the City's response to those revisions, but Mirant Willow Pass prefers to resolve reimbursement matters directly with the City rather than involve the Commission or its staff. Assuming that a reimbursement agreement (or a similar bilateral agreement) is finalized and executed, then the City's Budget Request should become moot.² Mirant Willow Pass therefore requests that the Commission not authorize reimbursement of any City-incurred fees, costs or expenses until after Mirant Willow Pass and the City have had a chance to close out discussions relating to the reimbursement agreement.

If the City were to pursue reimbursement through the Commission process (which should not be necessary as noted above), then the Budget Request would need to be revised in several respects to comply with Section 25538 of the California Public Resources Code ("PRC") and Section 1715 of the Commission's regulations. Below is a summary of issues raised in the Budget Request that would need to be resolved before reimbursement could be approved. This

¹ Title 20 of the California Code of Regulations ("CCR") § 1715.

² Under 20 CCR § 1715(b)(2), a local agency is not entitled to reimbursement via the Commission process of fees and costs that it recovers from another source.

summary reflects the issues identified through Mirant Willow Pass's initial review of the Budget Request. Mirant Willow Pass reserves the right to submit additional comments (including comments elaborating on the issues raised below) and to assert additional objections (including pursuant to Section 1715(c)(4) of the Commission's regulations) in response to subsequent filings or submissions by the City or Commission staff.

1. The Budget Request should be revised to describe the specific review that the City is undertaking at the Commission's request, and to explain why the fees and expenses that the City seeks to recover are "added costs" necessitated by services performed "directly" in response to the Commission's request. The Budget Request seeks approval of a budget of \$311,400 for the fourth quarter of 2008 for fees and expenses incurred for City staff and third party consultants and advisors to review and analyze the AFC. The fees are computed by attributing an hourly rate to 19 individuals and multiplying those rates by the number of hours that each individual is expected to devote to this project during the quarter. The Budget Request includes expenses for travel, meals and "other," plus a 20 percent contingency added to the total. The Budget Request states that it covers activities such as initial review of the AFC and related documents, review and analysis of project design and land use issues, and environmental review.

Under PRC section 25538 and Section 1715(a)(1)(A) of the Commission's regulations, local agencies are entitled to recovery of the "added costs" of services performed "directly" in response to requests for review and input from the Commission. Under this standard, costs eligible for reimbursement through the Commission only include costs that a local agency incurs in directly responding to the Commission's request for review, and that would not otherwise have been incurred in the absence of the Commission's request.³ The Budget Request references an October 17, 2008 notice from the Commission, but it does not describe the specific review that the City is undertaking at the Commission's request or explain how the City's proposed fees and expenses relate to that work.

Instead, the Budget Request appears to seek reimbursement for all City time to be spent this quarter in reviewing and analyzing the AFC and participating in this proceeding. This exceeds the scope of fees and costs that are reimbursable via the Commission process. The Budget Request should be revised to describe the specific review that the City is undertaking in response to the Commission's request and to explain why the fees and expenses it seeks to

³ For example, 20 CCR § 1715(b) specifically disallows recovery of "expenses incurred by a local agency for the presentation or defense of positions not reasonably related to the matters which the agency is requested to review or not within the area of the agency's expertise," and "expenses incurred in advocating a position as a formal intervenor to the proceeding."

recover are added costs necessitated by services performed directly in response to the Commission's request.

2. The Budget Request should be revised to provide missing information. The Budget Request identifies the job title of each reviewer, the number of hours to be billed to the AFC, and the applicable hourly rate. However, Section 1715(c)(2) of the Commission's regulations requires a local agency to justify each line item amount and to explain how each line item is reasonably related to the matters which the City has been requested by the Commission to review. The Budget Request should be amended to provide this level of detail. In addition, the Budget Request provides a quarterly budget, but does not explain whether it covers all costs expected to be incurred in responding to the Commission's October 17, 2008 request. The Budget Request should be revised to include all work reasonably expected to be incurred in responding to the Commission's October 17, 2008 request.⁴ Finally, the Budget Request does not explain why the Commission's request for review, which the City received on or about October 17, 2008, necessitated 352 hours of City review/work time in the month of October.⁵ Any fees, costs or expenses incurred before the date of the Commission's request should not be recoverable under the Commission's rules. Also, because the Budget Request was submitted after the month of October ended, the numbers for October should not be an estimate, but should reflect the hours actually worked in responding directly to the Commission's request for review.

3. The Budget Request should be revised to provide more explanation of why all proposed fees and costs are eligible for reimbursement under the Commission's rules. The Budget Request provides for reimbursement of significant expenses to be paid to outside consultants and advisors. The Commission's local agency reimbursement policy specifies that "the reasonable cost of consultant, expert witness, and legal services may be reimbursed if the agency's in-house staff with expertise on the subject are unable to undertake the necessary work in the time frame requested by the Commission." The Budget Request should be revised to explain why it is necessary for the City to incur the identified third party expenses in order to respond to the Commission's October 17, 2008 request in the requested time frame.⁶ The Budget Request also should explain why expenses for mileage, meals and "other" are

⁴ Also, if the City were to seek reimbursement for costs incurred to respond to subsequent Commission requests, then that would need to be covered in a separate filing that conforms with the Commission's regulations, not in another quarterly budget submitted under this Budget Request.

⁵ This is more than the 309 hours that the City plans to work in November, and the 253 hours that the City plans to work in December.

⁶ The Commission's reimbursement policy also specifies that consultant expenses (which should include outside counsel fees) incurred to prepare a budget request are not recoverable. The Budget Request does not confirm that these costs are excluded.

necessitated by the Commission's October 17, 2008 request. It also is not clear that a 20 percent contingency is warranted.⁷

4. The Budget Request does not demonstrate why other "permit fees" should be reimbursed. The Budget Request provides for reimbursement of "permit fees, including traffic impact fees, drainage fees, park-in-lieu fees, sewer fees, public facilities fees, and the like, but not processing fees, that the local agency would normally receive for a powerplant or transmission line application in the absence of Commission jurisdiction." The Budget Request quotes this phrase from Section 1715(a) of the Commission's regulations, but does not cite any City regulation or policy specifying the amount of such fees or how they would apply to the WPGS if the Commission did not have exclusive siting authority. The Budget Request only refers to the charges for review of the AFC by the various City employees and representatives listed in the appendix. However, fees of this type appear to fall in the category of "processing fees," which the regulations specify are not recoverable via the Commission. Instead, such fees should be reimbursable only to the extent that they constitute "added costs" for services performed directly in response to the Commission's requests for review of the AFC.

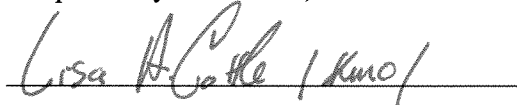
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As discussed above, Mirant Willow Pass expects to work cooperatively with the City to address reimbursement matters through a bilateral agreement. This approach is preferable to reliance on the Commission's reimbursement policies for a number of reasons, including because it will avoid the need to place the Committee or staff in the middle of discussions between the applicant and the City. Addressing reimbursement through a direct agreement also provides flexibility to include fees, costs, expenses, and other remuneration that are not allowed under the Commission's reimbursement policies.

Mirant Willow Pass appreciates the opportunity to submit this response.

November 21, 2008

Respectfully submitted,



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⁷ At a minimum, a 20 percent contingency on actual expenses does not seem necessary or appropriate.

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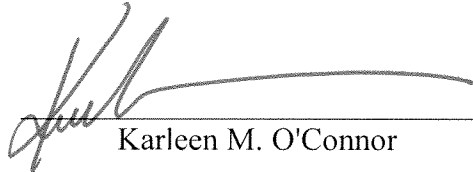
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PROOF OF SERVICE

I, Karleen M. O'Connor, declare that on November 21, 2008, I deposited copies of the attached *Applicant's Response to City of Pittsburg Itemized Budget and Request for Reimbursement* via electronic mail and by mailing a properly addressed copy by first-class mail with postage prepaid to all parties on the attached service list.

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



Karleen M. O'Connor

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