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STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:

)	
Complaint & Investigation)	Docket No. 11-CAI-02
Jurisdictional Determination Regarding East and)	
North Brawley Geothermal Developments)	

OPENING BRIEF OF ORMAT NEVADA, INC.

Pursuant to the Committee’s September 26, 2011 Order, Ormat Nevada, Inc. (“Ormat” or “Respondent”) hereby submits this Opening Brief supporting denial of the Verified Complaint and Request for Investigation (“Complaint”) by California Unions for Reliable Energy (“CURE” or “Complainant”). Despite submitting more than 1,880 pages of various documents as “evidence”¹ in this proceeding and despite having been given extraordinary discovery not contemplated in the California Energy Commission’s (“Commission’s”) regulations, as a second opportunity to develop a case that should have been presented in its Complaint,² CURE has completely failed to meet its burden to prove the allegations set forth in its Complaint. In fact,

¹ It should be noted that of the 52 exhibits that are represented by the 1,880 pages, CURE’s response to an inquiry from Hearing Officer Celli has identified only Exhibits 1, 7, 15, 19, 26, 29, 33, and 39 as being relevant to its allegations. *See* 9/26/11 RT 16: 22-25, 17:1-4, 18:9-11. Also *see generally* 9/26/11 RT 18-22.

²CURE issued data requests even though the Commission’s regulations do not provide for discovery by the Complainant. Ormat responded to these requests. Thereafter, CURE was given the extraordinary opportunity at a technical conference to question Ormat engineers at length in the manner of a deposition, where Ormat provided to CURE a substantial amount of information, including confidential and proprietary engineering information. On the other hand, CURE failed to respond to both a data request seeking information regarding its intended testimony—information that by rule CURE should have provided in the complaint itself, and an inquiry made by Respondent’s counsel at the technical conference. (*See* Ex. 206; 9/26/11 RT 89:23-25). Instead, CURE was allowed over Ormat’s objection to surprise all parties with extensive oral testimony at hearing setting forth facts and allegations not included in the complaint nor disclosed in response to Ormat’s data request. Despite all of these unfair advantages, CURE was still unable to provide any credible testimony at hearing supporting its claims.

CURE failed to present any evidence that could support a decision in favor of CURE as addressed herein.

Throughout this proceeding, Respondent has maintained that CURE's Complaint is invalid, lacks any factual support, and fails to set forth a prima facie case alleging a violation of any statute, order, decision, or regulation adopted, administered, or enforced by the Commission as required by Commission regulations. The defects in CURE's complaint were not remedied by CURE's presentation of its affirmative case during the evidentiary hearing. CURE's own witnesses admitted that they were unable to testify that the North Brawley Geothermal Development Project ("North Brawley") and the East Brawley Geothermal Development Project ("East Brawley") were individually capable of generating more than 49.5 net megawatts. Remarkably, CURE did not offer even one witness to establish the facts alleged in its complaint regarding the aggregation of the generating capacities of North Brawley and East Brawley, instead choosing to "rest" on the exhibits identified in CURE's opening statement.³

As described in Respondent's September 30, 2011 letter to the Committee requesting an expedited ruling on Respondent's Motion to Dismiss ("September 30 Letter"), which is hereby incorporated by reference, even a cursory examination of the exhibits cited by CURE reveals that those documents do not support CURE's allegation that North Brawley and East Brawley are a single facility. Therefore, CURE has completely failed to prove by any evidence, much less by a preponderance of the evidence, the allegations identified in its Complaint. There is no substantial evidence in this record that could legally support a decision in favor of CURE; a decision granting the Complaint would be an abuse of the Commission's discretion and wrong as a matter of law. Both CURE's claim that Ormat violated the Warren-Alquist Act by failing to license the North Brawley and East Brawley facilities through the Commission, and CURE's

³ 9/26/11 RT 214: 12-14.

claim that Ormat violated the Warren-Alquist Act by failing to license a 100 MW geothermal facility, must be denied.

DISCUSSION

I. CURE Has Failed to Present Evidence That the Generating Capacity of Either North Brawley or East Brawley, Calculated Pursuant to the Commission's Methodology, is 50 MW or more.

A. The evidence conclusively establishes that the generating capacities of North Brawley and East Brawley, respectively, are each under 50 megawatts.

Pursuant to the Warren-Alquist Act, the Commission has exclusive permitting jurisdiction over a thermal powerplant with a net generating capacity of 50 megawatts or more.⁴

The generating capacity of an electrical generating facility is calculated as the difference between the maximum gross rating of the plant's turbine generator(s) in megawatts, at the steam conditions and at those extraction and induction conditions which yield the highest generating capacity on a continuous basis, and the minimum auxiliary load for the facility.⁵ For geothermal facilities the minimum auxiliary load includes the minimum electrical operating requirements for the associated geothermal field which are necessary for and supplied directly by the power plant.⁶

The evidence in this proceeding, which includes testimony from Respondent's geothermal experts, independent review by Commission Staff and testimony from CURE, clearly establishes that the net generating capacities of North Brawley and East Brawley, calculated pursuant to the Commission's methodology, are each 49.5 megawatts.⁷ Robert Sullivan, an undisputed expert with over 20 years of experience with geothermal power plant design and operations, testified that North Brawley and East Brawley were each specifically designed to be

⁴ Cal. Public Resources Code §§ 25500, 25119, 25110.

⁵ 20 C.C.R. § 2003(a)-(b).

⁶ 20 C.C.R. § 2003(c).

⁷ Ex. 200, pp. 2-3; 9/26/11 RT 242: 22-23, 245:13-14, 314:11-20, 315:5-9; Ex. 301, pp. 1-3, 5.

49.5 net megawatt facilities, and that the 49.5 megawatt figure is a “hard limit” based on the following constraints: (1) the Ormat Energy Converters that are specifically customized for the projects;⁸ (2) transmission;⁹ (3) piping systems, including 80,000 feet of pipe for North Brawley;¹⁰ (3) the corrosive characteristics of the geothermal fluid in the North Brawley Known Geothermal Resource Area (“North Brawley KGRA”);¹¹ (4) fluid velocities;¹² (5) cabling;¹³ (6) resource temperatures;¹⁴ (7) permit limitations;¹⁵ and (7) project economics.¹⁶ Furthermore, both Mr. Sullivan and Don Campbell, an undisputed expert in geothermal field resources, testified that there are significant resource constraints at the North Brawley and East Brawley that currently limit the generation capacity of these projects. Due to resource constraints, the current net generating capacity of North Brawley is approximately 33 megawatts.¹⁷ Therefore, neither North Brawley nor East Brawley is subject to the Commission’s jurisdiction as the net generating capacity of North Brawley and East Brawley is each individually below 50 megawatts.

The testimony of CURE’s witnesses regarding the generating capacities of North Brawley and East Brawley supports the conclusion that the Commission does not have jurisdiction over either North Brawley or East Brawley. Of the two witnesses sponsored by CURE, neither of whom had any experience with geothermal resources or geothermal power plant operations,¹⁸ or any apparent experience with geothermal power plants in general,¹⁹ only one witness, David Marcus, testified that he had reviewed the Commission’s methodology for

⁸ 9/26/11 RT 236: 15-18.

⁹ 9/26/11 RT 235: 1.

¹⁰ 9/26/11 RT 235:2-9, 236:4-11.

¹¹ 9/26/11 RT 235:10-14.

¹² 9/26/11 RT 235:15-25, 236:1-11.

¹³ 9/26/11 RT 236:12-14.

¹⁴ 9/26/11 RT 239:2-9.

¹⁵ 9/26/11 RT 236:20.

¹⁶ 9/26/11 RT 238:11-12.

¹⁷ 9/26/11 RT 238:25; 244: 3.

¹⁸ 9/26/11 RT 73: 1-6, 13-23.

¹⁹ Ex. 49,

determining the generating capacity of a facility in support of his testimony.²⁰ Although Mr. Marcus speculated at length regarding the generating capacity of North Brawley and East Brawley based upon a hypothetical brine flow, when asked the ultimate question regarding the generating capacity of North Brawley and East Brawley, Mr. Marcus admitted that he could not, under oath, testify that either facility could produce more than 49.5 megawatts.²¹

CURE's other witness, Robert Koppe, testified that he had no knowledge of the Commission's methodology for calculating the generating capacity of a power plant.²² As it is undisputed that the Commission's methodology is controlling for determining the generating capacity of a power plant,²³ Mr. Koppe's testimony regarding the generating capacities of either North Brawley or East Brawley is simply irrelevant to this proceeding.

In summary, CURE presented only two witnesses. Neither witnesses could testify that either North Brawley or East Brawley are capable of producing 50 net megawatts or more, as calculated pursuant to the Commission's methodology. Therefore, CURE has clearly failed to meet its burden to prove its allegation that North Brawley and East Brawley are subject to the Commission's jurisdiction. As CURE has failed to meet its burden of proof, CURE's Complaint must be denied.

B. CURE's Complaint should be denied for failure to prove the allegations in the Complaint regarding the generating capacities of North Brawley and East Brawley.

CURE's Complaint alleges that North Brawley and East Brawley are individually subject to the Commission's jurisdiction on the basis that "the 50 MW of generation . . . from North

²⁰ 9/26/11 RT 74: 22-25, 75:1-22.

²¹9/26/11 RT 185:3-12 MR. ELLISON: Okay. And if you were to increase the brine flow, so that that was not a limiting condition, do you know that all of the surface facilities, pumps, wiring, cabling, OECs everything, the plant as a whole, can you testify under oath that that project can produce more than 49.5 megawatts?

MR. MARCUS: No.

²² 9/26/11 RT 171:24-25, 172:1-2.

²³ Ex. 1, pp. 12-14, 16-17; Ex. 200, p. 3; Ex. 300.

Brawley and the additional 50 MW of generation it intends to sell to [Southern California Edison (“SCE”)] from East Brawley is the difference between the facilities’ maximum gross rating and minimum auxiliary load.”²⁴ However, CURE did not present any evidence on these allegations, either through exhibits or through witness testimony at the evidentiary hearing.

First, CURE presented no evidence to support its allegation that the 50 megawatt figure in the North Brawley power purchase agreement (“North Brawley PPA”) represents the generating capacity of North Brawley for the purposes of the Commission’s jurisdiction. In fact, CURE presented evidence to the contrary - CURE’s witness testified that the North Brawley PPA is *irrelevant* to the Commission’s method for calculating the generating capacity of facility.²⁵

Second, CURE presented no evidence to support its allegation that Respondent “intends to sell” 50 megawatts from East Brawley to SCE under the North Brawley PPA. In fact, the evidence explicitly shows that Ormat was negotiating with SCE for a separate power purchase agreement for East Brawley.²⁶

Third, CURE presented no evidence that the “50 MW of additional generation from East Brawley” represents the generating capacity of East Brawley for the purposes of assessing the Commission’s jurisdiction.

²⁴ Verified Complaint of the California Unions for Reliable Energy, 11-CAI-02 p. 18 (dated June 28, 2011) (hereinafter “Complaint”).

²⁵ 9/26/11 RT 187:1-6

MR. ELLISON: So is it your testimony that the Power Purchase Agreement is irrelevant to determining capacity in accordance with the Commission's method?

MR. MARCUS: I believe it is irrelevant, according to the Commission's method, which says nothing about contract limits.

²⁶ Ex. 19, p. 28.

CURE has failed to present any evidence in support of these allegations. Therefore, CURE has failed to meet its burden to prove its allegation by a preponderance of the evidence. As this claim has no merit, CURE's Complaint should be dismissed.

II. CURE Has Failed to Present Evidence That North Brawley and East Brawley Are A Single Facility.

A. The evidence conclusively establishes that North Brawley and East Brawley are separate and distinct projects that operate independently of each other.

Commission precedent sets forth the following factors that should be evaluated when determining whether the generating capacity of multiple generators should be aggregated for the purposes of assessing the Commission's licensing jurisdiction: (1) the physical proximity of the generation facilities; (2) the extent to which they are planned and operated as a coordinated larger project; (3) the extent to which they do or could reasonably share common facilities; and (4) the timing of development and construction of the facilities.²⁷ In this proceeding, the evidence clearly establishes that North Brawley and East Brawley are independent and separate projects, and that the aggregation of the generating capacities of these two projects is improper.

First, North Brawley and East Brawley are not located in close physical proximity. The two projects are located 1.75 miles apart.²⁸ That distance is not unusually close for separate geothermal facilities that must be located near to a known geothermal resource area and does not indicate that the projects are one facility. Therefore, the proximity of the projects does not support aggregating the generating capacities of the two facilities for the purposes of assessing the Commission's licensing jurisdiction.

²⁷ Memorandum from California Energy Commission General Counsel William M. Chamberlain Regarding Commission Jurisdiction Over Kern Island Cogeneration Project, pp. 8, FN 10, 9/ (May 20, 1986) (docketed in 11-CAI-02 on Sept. 14, 2011).

²⁸ 9/26/11 RT 232:10-11.

Second, North Brawley and East Brawley were planned as separate projects, developed as separate projects, are internally treated as separate and distinct projects by Ormat, and will be operated as separate projects.²⁹ There is no evidence in the record supporting CURE's allegation that the projects were planned or will be operated (assuming the East Brawley project is approved by the County) as a coordinated larger project. Therefore, this factor does not support aggregating the generating capacities of the two facilities.

Third, North Brawley and East Brawley do not share any common facilities.³⁰ The sharing of some facilities, such as a gen-tie or even control rooms, would not necessarily mean separate projects should be deemed one under CEQA or past Commission precedent. In this case, however, the Commission need not even reach the question of how much sharing is appropriate, since there is none at all. This factor does not support aggregating the generating capacities of the facilities.

Fourth, the schedules for development and construction of these two projects are very different. Construction of North Brawley was completed in 2008, with operations commencing shortly thereafter, whereas East Brawley is still in the permitting process, with the goal of commencing commercial operations in 2013.³¹ There is a nearly four-year gap between the development and construction of the two projects. This factor does not support aggregating the generating capacities of the facilities.

As discussed above, the evidence establishes that North Brawley and East Brawley are independent and separate projects, and do not constitute a single facility. As North Brawley and East Brawley do not constitute a single facility, aggregation of the generating capacities of these two projects for the purpose of asserting Commission jurisdiction is improper.

²⁹ 9/26/11 RT 234: 10-12.

³⁰ 9/26/11 RT 232: 21-23.

³¹ 9/26/11 RT 231: 12-14.

B. CURE's allegations that North Brawley and East Brawley are a single project are completely devoid of any evidentiary support.

CURE alleges in its Complaint that North Brawley and East Brawley “is one facility with a combined generating capacity of 150MW” that “will function as interdependent and physically interconnected generating units, sharing both transmission and water supply infrastructure.”³² Yet, none of these allegations by CURE have been proven either by citation to CURE's evidentiary exhibits or through witness testimony at the evidentiary hearing. For example, CURE's Complaint alleges that “both facilities will interconnect to the electrical grid through one substation.”³³ This allegation was repeated during CURE's opening statement at the evidentiary hearing.³⁴ As support for this allegation, CURE's counsel cited generally to Exhibit 1. No witness was sponsored to testify to this allegation. As described in Respondent's September 30 Letter, this allegation is not supported by the “Statement of Facts” contained within CURE's Complaint, or any other evidentiary exhibit.

CURE's Complaint also alleges that “North Brawley and East Brawley will share utility service between a water supply agreement between Ormat and the City of Brawley.”³⁵ This allegation suffers from the same flaws discussed above. No witness was sponsored to testify to this allegation. This allegation is not supported by the “Statement of Facts” contained within CURE's Complaint, or any other evidentiary exhibit. Therefore, CURE has failed to prove this allegation.

CURE also alleges, in both its Complaint and during its opening statement, that “North Brawley and East Brawley will be physically joined to facilitate cooling water blowdown

³² Complaint p. 2.

³³ Complaint, pp. 20-21.

³⁴ 9/26/11 RT 20:19-21, citing to Ex. 1.

³⁵ Complaint, pp. 20-21.

delivery from the North Brawley facility to the East Brawley facility.”³⁶ Beyond a general citation to Exhibit 1, no other evidence was provided in support of this allegation. No witness was sponsored to testify to this fact. This allegation is not supported by the “Statement of Facts” contained within CURE’s Complaint, or any other evidentiary exhibit. Therefore, CURE has failed to prove this allegation.

In summary, CURE has utterly failed to present or identify any evidence that would support treating North Brawley and East Brawley as a single facility for the purposes of assessing the Commission’s licensing jurisdiction. In fact, uncontested evidence establishes that North Brawley and East Brawley are independent and separate projects and should not be aggregated for the purposes of assessing the Commission’s licensing jurisdiction. Therefore, CURE’s claims regarding aggregation must be denied.

III. Ormat and Imperial County have reasonably relied upon the Commission’s rules and precedents establishing its jurisdiction and a decision in favor of CURE would be devastating to Ormat and to Imperial County’s effort to develop clean, renewable resources.

Imperial County (“County”) has been involved with the permitting of geothermal projects at the local level for over 40 years, and has prepared a master Environmental Impact Report for the development of power plants in the North Brawley Known Geothermal Resource Area.³⁷ The County is fully cognizant of the Commission’s jurisdiction over geothermal power plants with a net generating capacity of 50 megawatts or more,³⁸ and has mechanisms in place to ensure that project developers do not install facilities with net generating capacities greater than 49.9 megawatts, including restrictions in conditional use permits.³⁹ Both the County and Ormat have invested resources and time in the processing of North Brawley and East Brawley in reasonable

³⁶ Complaint, pp. 20-21; 9/26/11 RT 20:23-25, citing to Ex. 1.

³⁷ 9/26/11 RT 290:18-21,

³⁸ 9/26/11 RT 301:4-8, 302: 19-20.

³⁹ 9/26/11 RT 295: 1-13.

reliance on the Commission's regulations for determining the generating capacities of power plants.⁴⁰

The County reviewed the conditional use permit application for North Brawley, confirmed that the project was under 50 megawatts, and processed the application consistent with the County's jurisdiction over projects under 50 megawatts.⁴¹ North Brawley was approved by the County almost four years ago, and constructed in reliance on a legal permit from Imperial County.⁴² Over \$300,000,000 has been invested by Ormat in reliance on this permit.⁴³ For CURE to allege now that the permit was improperly issued, nearly four years after issuance of the permit, is clearly unreasonable. This untimely complaint is all the more unreasonable where CURE's delay is so extremely prejudicial to Ormat, given Ormat's investment of over \$300,000,000.

Similarly, East Brawley has been in development since August 2008. CURE has been aware of the East Brawley project since at least August 2009, and has been active in the environmental review process, including submitting more than 300 pages of comments on the Draft Environmental Impact Report.⁴⁴ CURE's delay in bringing this complaint is patently unreasonable, given its early involvement with East Brawley, and is extremely prejudicial to Ormat, who has invested substantial time, money, and resources in the development of East Brawley. Therefore, CURE's Complaint must be denied.

⁴⁰ As to North Brawley, the County and Ormat also reasonably relied on the fact that the Commission had actual notice of the County's environmental review and issuance of a conditional use permit to North Brawley (9/26/11 RT 281: 21-24, 302:19-22, 319:15-17) and did not object to nor appeal the County's review and approval of North Brawley within the period provided by statute for such objection or appeal. (See generally, Cal. Pub. Res. Code §§ 21165, 21167(c); see also CEQA Guidelines, sections 15050 et seq. [regarding selection of lead agencies and criteria for designating the lead agency under CEQA].)

⁴¹ 9/26/11 RT 293: 13-17.

⁴² Ex. 200, Appendix C.

⁴³ In *People v. Department of Housing & Community Development*, the Court stated that "Forty thousand dollars represents an undebatable quantum of prejudice." 45 Cal. App. 3d 185, 197 (1975).

⁴⁴ 9/26/11 RT 299: 11-12.

IV. CURE's Complaint Must be Denied to Preserve the Integrity of the Commission's Regulatory Standards Requiring That Complaints Be Supported By Facts, Not Mere Speculation.

Section 1231 of the Commission's Regulations sets forth a significant standard for the filing of a complaint alleging a violation of law. Specifically, a complainant must support, with facts and a declaration by a competent declarant that attests to the truth and accuracy of any factual allegation, the alleged violations of law contained in the complaint.⁴⁵ This important standard is commensurate with the seriousness of an allegation that a member of the public has violated the law, and where such an allegation requires the accused to appear to provide a defense at great time and expense.

In this proceeding, CURE has proceeded in a cavalier manner, showing little regard for the seriousness of its allegations, and evading its burden to provide facts to support its allegations. CURE's Complaint acknowledges that CURE did not have any facts or evidence regarding the generating capacity of either North Brawley or East Brawley, let alone facts or evidence that the generating capacity of either facility is 50 megawatts or more, yet CURE freely speculates that Ormat has broken the law.⁴⁶

It is not sufficient to merely allege or speculate in a complaint, as CURE has done here, that the net generating capacities of North Brawley and East Brawley are 50 megawatts or more.⁴⁷ CURE is *required*, pursuant to Section 1231, to provide specific facts in the complaint to support its allegations.

In order to avoid recurring vexatious complaints by parties such as CURE who are unable to meet even the most basic Section 1231 threshold for filing a complaint, it is critical that the

⁴⁵ 20 C.C.R. § 1231(a)(8). Verification by counsel, as here, does not establish the facts alleged in the pleading for evidentiary purposes. Cal. Code Civ. Pro § 446(a).

⁴⁶ Complaint, p. 11.

⁴⁷ 9/26/11 RT 92:6-12

Commission's decision in this instance expressly recognize the standards of Section 1231 and make clear that future frivolous complaints failing to meet this standard will be summarily dismissed. The integrity of the Commission's regulatory requirements must be protected. CURE's Complaint must be denied.

CONCLUSION

CURE has failed to provide any evidence to support its allegations that (1) the generating capacities of North Brawley and East Brawley are 50 megawatts or more, respectively and (2) that the generating capacities of North Brawley and East Brawley should be aggregated. Furthermore, the evidence establishes that CURE's unreasonable delay in bringing its Complaint has resulted in substantial prejudice to Ormat, who has invested substantial time and resources in the development of North Brawley in reliance on a legal permit issued by Imperial County. For the foregoing reasons, Ormat respectfully requests that the Commission dismiss CURE's Complaint, with prejudice, and issue an order disclaiming jurisdiction over both North Brawley and East Brawley.

October 12, 2011

Respectfully submitted,

By:  _____

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of Complaint Against)
ORMAT NEVADA, INC. Brought By) Docket No. 11-CAI-02
CALIFORNIA UNIONS FOR RELIABLE)
ENERGY)
_____)

PROOF OF SERVICE

I, Karen A. Mitchell, declare that on October 12, 2011, I served the attached *Opening Brief of Ormat Nevada, Inc.* via electronic and U.S. mail to all parties on the attached service list.

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



Karen A. Mitchell

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