

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

DOCKET

11-CAI-02

DATE JAN 04 2012

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In the Matter of:

Complaint Against Ormat Nevada, Inc.
Brought By California Unions for
Reliable Energy

Docket No. 11-CAI-02

**PETITION FOR RECONSIDERATION OF
COMMISSION DECISION AND ORDER NO. 11-1130-4
BY CALIFORNIA UNIONS FOR RELIABLE ENERGY**

January 4, 2012

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UNIONS FOR RELIABLE ENERGY

Pursuant to Decision and Order No. 11-1130-4 (“Decision”) and section 1720 of the Commission’s regulations, Cal. Code Regs., tit. 20 § 1720, California Unions for Reliable Energy (“CURE”) submits this Petition for Reconsideration of Decision and Order No. 11-1130-4.

I. Introduction

The Decision violates the Warren-Alquist Act and the Commission’s regulations and must be vacated by the Commission. The Commission has plenary licensing jurisdiction over all thermal powerplants with a generating capacity of 50 megawatts or more, whether proposed or constructed. The Commission is further required by its regulations to determine generating capacity solely based on a powerplant’s generating equipment and in light of the plant site’s ambient conditions. The Decision does not comply with these requirements and, therefore, violates the law.

II. The Decision Violates the Warren-Alquist Act

In the Decision, the Commission concluded that it lacks jurisdiction over the North Brawley Geothermal Development Project and the East Brawley Geothermal Development Project. The Commission reached the Decision even though Ormat holds a permit authorizing construction of a ***59 megawatt*** thermal powerplant at the North Brawley site and applied for a permit authorizing the construction of a ***59 megawatt*** thermal powerplant at the East Brawley site. In particular, according to Ormat’s own evidence, 5 of its generating units have a combined net generating capacity of 49.5 megawatts. Yet, Ormat sought, and Imperial County

granted, a permit for 6 generating units at its North Brawley site.¹ Ormat is now seeking a permit from Imperial County for 6 generating units at its East Brawley site.² Using Ormat's own data, it is undisputed that 6 generating units have a generating capacity of more than 50 megawatts.³ Under the Warren-Alquist Act, only the Commission can issue a license authorizing the construction of the North Brawley and East Brawley powerplants.

The Decision ignored the generating equipment authorized by the North Brawley conditional use permit and the generating equipment proposed in the East Brawley conditional use permit application. Instead, the Decision concluded that the Commission lacks jurisdiction because, *at this time*, Ormat does not plan to construct all of the hardware sought and permitted.⁴ At the November 30, 2011 Commission Business Meeting, Staff counsel, Jeff Ogata clarified the Commission's remarkable legal rationale as follows:

We do not pay attention to the permits. We pay attention to what is actually being built We always reserve the right to review any changes to the design so if . . . [Ormat actually were to] install a 6th turbine than there may be grounds at that point to review that and see whether or not that, at that point, the net generating capacity does exceed 50 MWs.⁵

Under the Commission's interpretation, a county could issue a permit for a 100 MW powerplant, and a developer could commence constructing that facility, all while the Commission waits to determine what is "actually being built." The Commission's

¹ Exh. 200, Ormat, Appx. C; *id.* at p. 5; *id.* at Appx. D, p. 7.

² See Exh. 200, Ormat, Appx. B, p. 2; see also Exh. 47, Ormat, p. 3.10-7 (Draft Environmental Impact Report evaluating a power plant with up to six generating units).

³ 9/26/11 RT p. 60:23-61:16, 104:3-105:10, RT 120:20-121:3; see Exh. 203, Ormat, "North Brawley Geothermal Power Plant Net and Gross Power Calculations," see *id.* at "East Brawley Geothermal Power Plant Net and Gross Power Calculations."

⁴ See Decision, pp. 7, 9, 11, 12, 20.

⁵ 11/30/11, RT 48:19-49:19 (emphasis added).

astounding interpretation of its authority cannot be squared with the Warren-Alquist Act's clear statutory text.

Through the explicit language of the Warren-Alquist Act, the Legislature expressed its unambiguous intent to grant the Commission *exclusive and mandatory licensing authority* over thermal powerplants with a generating capacity of 50 megawatts or more.⁶ The Commission has licensing jurisdiction over such facilities whether they are proposed or constructed.⁷ The Commission's exclusive jurisdiction to *license* all such facilities is set forth in section 25500, which provides:

In accordance with the provisions of this division, the commission *shall have the exclusive power to certify all sites and related facilities in the state*, whether a new site and related facility or a change or addition to an existing facility. *The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities*, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law⁸

Pursuant to section 25216.5,

the Commission shall . . . prescribe the form and content of applications for facilities; conduct public hearings and take other actions to secure adequate evaluation of applications; and formally act to approve or disapprove applications, including specifying conditions under which approval and continuing operation of any facility shall be permitted.

Under the Act, the Commission's authority supersedes the permitting authority of every other local, state and regional agency.⁹

⁶ Pub. Resources Code §§ 25500, 25110, 25120; *see also* Pub. Resources Code § 25006.

⁷ Pub. Resources Code § 25119.

⁸ Pub. Resources Code § 25500 (emphasis added).

⁹ Pub. Resources Code §§ 25006.2; 25500.

In sum, the Commission's jurisdiction arises when a thermal powerplant with a generating capacity of 50 megawatts or more is **proposed**, and the Commission is the **only** agency in the State with authority to prescribe conditions specifying the manner in which such facility can be built. Accordingly, the Commission has exclusive jurisdiction over North Brawley and East Brawley, and Imperial County has none. The Decision is clearly at odds with the Warren-Alquist Act and must be vacated by the Commission.

III. The Decision Violates Sections 2001 and 2003 of the Commission's Regulations

In the Decision, the Commission concludes that it lacks jurisdiction over the North Brawley and East Brawley powerplants because "fuel constraints," Ormat's economic considerations, transmission constraints, and the County's conditional use permit conditions reduce each plant's generating capacity to less than 50 megawatts.¹⁰ Not one of these factors is legally relevant to a plant's generating capacity. CURE repeatedly explained this to the Commission during the course of this proceeding,¹¹ and at the November 30, 2011, Commission Business Meeting it became clear that CURE's contention is shared by the Commission's own counsel:

First of all, I believe that staff is in agreement with just about everything that CURE said except for the conclusion We don't look at any other documents because they're right. Those documents, to a large extent, are irrelevant to our consideration of how we do net generating capacity pursuant to our regulations¹²

Consistent with Mr. Ogata's observation, the Commission is required to apply the definitions contained in section 2003 of the Commission's regulations to

¹⁰ See *id.* at pp. 10, 12.

¹¹ See 9/26/11 RT, 166:3-14; Opening Brief of California Unions for Reliable Energy, pp. 28-29, Reply Brief of California Unions for Reliable Energy, pp. 15-24; California Unions for Reliable Energy Comments on the Presiding Members' Proposed Decision, pp. 1-3; 11/30/11 RT, 43:24-47:24.

¹² 11/30/11, RT 48:17-49:9.

determine whether a power plant is a “facility,” within the meaning of the Act.¹³

Whether a powerplant meets the Commission’s jurisdictional capacity threshold is dependent solely on the facility’s generating equipment capabilities at the average temperature, air pressure, and relative humidity during intended operation.¹⁴

Contrary to the Decision, the Commission is not authorized to rely on any other factor to conclude that it lacks jurisdiction over a thermal powerplant.

It is easy to see why the Commission was wrong to rely on fuel constraints, Ormat’s economic constraints and transmission constraints, and County permit conditions in determining ***generating capacity***: A 100 megawatt gas-fired power plant does not fall outside the Commission’s jurisdiction simply because the gas utility reduces the physical capacity of the plant’s gas delivery pipeline; a gas-fired power plant with ten, 49.9 megawatt turbines does not fall outside the Commission’s jurisdiction because its interconnection agreement accommodates only 49.9 megawatts; and a 59 megawatt powerplant does not fall outside the Commission’s jurisdiction because a county permit describes that facility as a 49.9 megawatt project. In all these cases, the Commission has mandatory, exclusive, and continuing jurisdiction over these facilities.

The Commission’s failure to apply sections 2001 and 2003 of the Commission’s regulations to determine whether North Brawley and East Brawley meet the Commission’s jurisdictional capacity threshold is a clear error of law.

When properly applied, the Commission’s regulations show that the North Brawley facility for which Ormat received a permit, and the East Brawley facility for which

¹³ See Cal. Code Regs. tit. 20, §§ 2001, 2003.

¹⁴ Cal. Code Regs., tit. 20, § 2003 subd. (a)-(c); California Energy Commission Staff General Method for Determining Thermal Power Plant Generating Capacity, p. 2.

DECLARATION OF SERVICE

I, Valerie Stevenson, declare that on, January 4, 2012, I served and filed copies of the attached **PETITION FOR RECONSIDERATION OF COMMISSION DECISION AND ORDER NO. 11-1130-4 BY CALIFORNIA UNIONS FOR RELIABLE ENERGY**, dated January 4, 2012. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

<http://www.energy.ca.gov/proceedings/11-cai-02/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

For service to all other parties:

- √ Served electronically to all e-mail addresses on the Proof of Service list;
- √ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with firstclass postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email service preferred."

AND

For filing with the Docket Unit at the Energy Commission:

- √ by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method);

OR

by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT
Attn: Docket No. 11-CAI-02
1516 Ninth Street, MS-4
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- √ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/

Valerie Stevenson



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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***IN THE MATTER OF COMPLAINT AGAINST
ORMAT NEVADA, INC. BROUGHT BY
CALIFORNIA UNIONS FOR RELIABLE ENERGY***

**Docket No. 11-CAI-02
(Revised 9/12/11)**

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