

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

**DOCKET**

**11-CAI-02**

DATE JAN 19 2012

RECD. JAN 20 2012

In the Matter of:

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

Docket No. 11-CAI-02

**COMMENTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY IN  
RESPONSE TO NOTICE OF HEARING ON PETITION FOR  
RECONSIDERATION OF  
COMMISSION DECISION AND ORDER NO. 11-1130-4**

January 19, 2012

Elizabeth Klebaner  
Tanya A. Gulesserian  
Marc D. Joseph  
Adams Broadwell Joseph & Cardozo  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080  
(650) 589-1660 Voice  
(650) 589-5062 Facsimile  
eklebaner@adamsbroadwell.com

Attorneys for the CALIFORNIA  
UNIONS FOR RELIABLE ENERGY

Pursuant to the January 5, 2012 Notice of Hearing on Petition for Reconsideration and Opportunity to Comment, California Unions for Reliable Energy submits the following comments.

We urge the Commission to withdraw Decision and Order No. 11-1130-4. The Decision concludes that the Commission lacks jurisdiction even where a developer applies for a permit from a local agency to construct generating equipment with a generating capacity of more than 50 megawatts.<sup>1</sup> In our Petition for Reconsideration, we explained that this conclusion violates the Warren-Alquist Act's clear directive that "the Commission shall have the exclusive power to certify all sites and related facilities in the state."<sup>2</sup> We also explained that, for this reason, the statement from the Commission's lawyer that "we do not pay attention to the permits. We pay attention to what is actually being built [for the purpose of a jurisdictional determination]" is legally untenable.<sup>3</sup>

But in addition to the statement being legally untenable, the statement from the Commission's lawyer is also factually inaccurate. The Commission's actual practice is to assume jurisdiction on the basis of the generating equipment described in a project proponent's *permit application*. We provide the Santa Clara Data Center Power Project as one example.<sup>4</sup> There, the Commission did not wait to see what would be built and did not defer to the project proponent's

---

<sup>1</sup> Decision, pp. 9-10, 12-20; *see also* 11/30/11 RT 48:19-49:19.

<sup>2</sup> Pub. Resources Code § 25500; *see generally*, Petition for Reconsideration of Decision and Order No. 11-1130-4 by California Unions for Reliable Energy.

<sup>3</sup> 11/30/11 RT 48:19-49:19.

<sup>4</sup> *See generally*, In the Matter of Santa Clara SC-1 Data Center, Phase 2 Power Project, Docket No. 2011-SPPE-1, November 2011, Application for Certification ("AFC").

“proposed design,” but asserted jurisdiction over the generating equipment described in the application, in accordance with the Warren-Alquist Act and Title 20.

In the Santa Clara Data Center Power Project case, Xerxes Ventures, LLC applied for a conditional use permit to construct a data center on a 16-acre site in the City of Santa Clara (“Project”).<sup>5</sup> Xerxes proposed to install 32 diesel fueled engine-generators on its site to provide for an uninterrupted power supply.<sup>6</sup> Xerxes planned to construct the Project in two phases. The first 16 generators would be constructed in Phase 1. Xerxes planned to submit a more specific proposal for Phase 2, and the City indicated that it would perform subsequent environmental review of Phase 2, pursuant to the California Environmental Quality Act.<sup>7</sup> According to the City’s Initial Study, the 32 generators have a gross generating capacity of 72 megawatts.<sup>8</sup>

In a letter dated April 1, 2008, the Commission concluded that Phase 1 and Phase 2 should be aggregated and that the Project’s generating capacity exceeds the 50 megawatt jurisdictional threshold.<sup>9</sup> On that basis, the Commission asserted permitting jurisdiction, stating that “to receive a *valid permit* for the 32 diesel generators, Xerxes must file with the Energy Commission either an application for a small power plant exemption ... or an application for certification.”<sup>10</sup> The

---

<sup>5</sup> AFC, Appendix A, p. 5.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* at p. 9.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.* at Appendix F, attached as Exhibit 1.

<sup>10</sup> *Id.* at Appendix F, p. 2 (emphasis added).

Commission *did not wait to see what would be built* to assume jurisdiction.<sup>11</sup> Instead, the Commission asserted jurisdiction based upon the project proponent's permit application and prohibited Xerxes from building the project without Commission authorization, consistent with the Commission's authority.

Xerxes now seeks to proceed with Phase 2, which includes installing the remaining 16 generators on the project site. Xerxes asserts that Phase 2 is designed to have a gross generating capacity of 49.1 megawatts.<sup>12</sup> Yet, the Commission did not simply defer to the project proponent's "proposed design."<sup>13</sup> The Commission performed its own analysis, as required by the Warren-Alquist Act and Title 20, and determined that it has jurisdiction over the Project.<sup>14</sup>

In the Decision here, the Commission's determination to ignore the generating equipment described in the North Brawley conditional use permit and the East Brawley conditional use permit application is arbitrary and violates the Act. Ormat Nevada, Inc. obtained a conditional use permit for generating equipment that can generate more than 50 megawatts at the North Brawley site and is seeking a conditional use permit for generating equipment that can generate more than 50 megawatts at the East Brawley site. On that basis alone, the Commission has exclusive jurisdiction over North Brawley and East Brawley under the Warren-Alquist Act. The Commission should withdraw the Decision because

---

<sup>11</sup> *Cf.* 11/30/11 RT 48:19-49:19.

<sup>12</sup> *See id.* pp. 18-20.

<sup>13</sup> *Cf.* 11/30/11 RT 48:19-49:19.

<sup>14</sup> *See AFC*, pp. 25-26.

the Commission has jurisdiction over the North Brawley and East Brawley facilities as a matter of law.

Dated: January 19, 2012

Respectfully submitted,

*/s/*

---

Elizabeth Klebaner  
Tanya A. Gulesserian  
Marc D. Joseph  
Adams Broadwell Joseph & Cardozo  
601 Gateway Blvd., Suite 1000  
South San Francisco, CA 94080  
(650) 589-1660 Telephone  
(650) 589-5062 Fax  
eklebaner@adamsbroadwell.com  
Attorneys for California Unions for Reliable  
Energy

# EXHIBIT 1

## CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET  
SACRAMENTO, CA 95814-5512  
www.energy.ca.gov



April 21, 2008

Mr. W. Tate Cantrell, Jr.  
Vice President, Data Center Technologies  
DuPont Fabros Technology, Inc.  
1212 New York Avenue, NW  
Suite 900  
Washington, DC 20005

RE: Diesel Backup Generators (Xeres Permit S-1 through S-32)

Dear Mr. Cantrell:

The California Energy Commission has received information regarding 32 low-use diesel backup generators that we understand Xeres Ventures, LLC, plans to install to support a data center at 535 Reed Street in Santa Clara, California. We also understand each backup generator has a rated capacity of 2.87 megawatts, which would make the total generating capacity at the site be 91.8 megawatts. We also understand Xeres is seeking a permit from the Bay Area Air Quality Management District, as well as a use permit from the City of Santa Clara.

The purpose of this letter is to inform you that the Energy Commission has permitting jurisdiction over the 32 diesel generators. As a general matter, the Energy Commission has jurisdiction over any site for a thermal power plant with a generating capacity of 50 megawatts or more. (Pub. Resources Code §§ 25110, 25120, 25500.) Here, the 32 generators, each to use diesel as a source of thermal energy to generate electricity, constitute a thermal power plant with more than 50 megawatts in generating capacity.

The aggregation of all 32 generators is based on their common location for a computer server campus and their common purpose to provide power conditioning and backup power to the data center that is also planned for the site. The issue of whether to aggregate the backup generators and view them as a thermal power plant under the Energy Commission's jurisdiction is one we have dealt with on more than one occasion. In all these cases, including a few in which the power plants were to be located a mile or more apart and two others which also involved diesel backup generators for a data center, the Energy Commission's Chief Counsel concluded the Commission has jurisdiction based on aggregating the proposed power plants, including backup diesel generators.

The factors supporting aggregation include such matters as the separate generating units: (a) being served by common structures, for example, a common control room or a common gas line, (b) if lacking a common control room, nevertheless being triggered to operate by the same event, for example, grid failure, (c) being under common ownership or subject to a common permit to operate, (d) being proposed as part of a foreseeable plan of development and, thus, constituting a "project" under the California Environmental Quality Act for purposes of environmental review by the permitting agency, and (e) being installed to serve a common industrial or commercial host.

Here, the generators will be located on one site proposed for the development of a data center. The generators are considered by the Air District to be components of a single project. The generators have the common purpose of serving as power conditioning and backup generators for a computer server campus being developed by a single project proponent. Their operation is likely to be triggered by the same event, for example, lightning storms or grid failure. Moreover, the potential for the generators to operate simultaneously should be analyzed in a comprehensive environmental document in accordance with the California Environmental Quality Act. Such analysis would identify the project's emissions, assess their impacts, identify feasible mitigation, and assess the potential health risks from this concentration of diesel engines.

For all these reasons, we believe the Energy Commission has permitting authority over the 32 generators, regardless of whether the power will be sold to the grid or used exclusively on-site. Thus, to receive a valid permit for the 32 diesel generators, Xeres must file with the Energy Commission either an application for a small power plant exemption (for a thermal power plant of 50 to 100 megawatts) or an application for certification. We believe an application for certification would be most appropriate, given the potential for adverse impacts from the use of diesel fuel in as many as 32 generators operating at one time.

In either case, the Energy Commission, as a matter of statute, serves as lead agency under the California Environmental Quality Act. As lead agency, it is responsible for preparing the appropriate environmental document for public review and consideration in deciding whether to approve the application. In the case of a small power plant exemption, the project is exempted from the Commission's jurisdiction and permitted at the local level. In the case of an application for certification, the project is permitted by the Energy Commission. During the certification process, the Commission and its staff work with the Air District, which is required under the Commission's regulations to issue a determination of compliance with the District's rules. The conditions of the District's determination, provided within the timeline of the Commission's proceeding, are incorporated into and become enforceable through the Commission's final decision.

Mr. W. Tate Cantrell, Jr.  
April 21, 2008  
Page 3

If Xeres wishes to claim otherwise about the Commission's jurisdiction, or seek a formal opinion from the Energy Commission, you may file a request for a jurisdictional determination under the Commission's regulations, specifically, section 1230 et seq. in Title 20 of the California Code of Regulations.

In any event, the staff of the Energy Commission is interested in working with you, DuPont Fabros Technology, Inc., and Xeres in a productive manner. Please do not hesitate to contact Arlene Ichien at (916) 654-3959 or by e-mail at [aichien@energy.state.ca.us](mailto:aichien@energy.state.ca.us) if you have any questions whatsoever.

Sincerely,



ARLENE L. ICHIEN  
Assistant Chief Counsel



MELISSA JONES  
Executive Director

cc: Michael J Tollstrup, Air Resources Board  
Tamiko Endow, Bay Area Air Quality Management District  
Gerardo Rios, US Environmental Protection Agency  
Terrance O'Brien, California Energy Commission

## DECLARATION OF SERVICE

I, David Weber, declare that on, January 20, 2012, I served and filed copies of the attached **COMMENTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY IN RESPONSE TO NOTICE OF HEARING ON PETITION FOR RECONSIDERATION OF COMMISSION DECISION AND ORDER NO. 11-1130-4**, dated January 19, 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

Sacramento, CA 95814-5512

[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

***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  
Michael J. Levy, Chief Counsel  
1516 Ninth Street MS-14  
Sacramento, CA 95814  
[mlevy@energy.state.ca.us](mailto:mlevy@energy.state.ca.us)

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/

---

David Weber



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – WWW.ENERGY.CA.GOV**

***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)**

**RESPONDENT**

Ormat Nevada, Inc.  
6225 Neil Road  
Reno, NV 89511

**COUNSEL FOR RESPONDENT**

Christopher T. Ellison  
Samantha Pottenger  
Ellison, Schneider and Harris, LLP  
2600 Capitol Avenue, Suite 400  
Sacramento, CA 95816  
[cte@eslawfirm.com](mailto:cte@eslawfirm.com)  
[sgp@eslawfirm.com](mailto:sgp@eslawfirm.com)

**COMPLAINANT**

California Unions for Reliable Energy  
c/o Adams Broadwell Joseph  
& Cardozo  
Marc D. Joseph  
Tanya A. Gulesserian  
Elizabeth Klebaner  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080  
[mdjoseph@adamsbroadwell.com](mailto:mdjoseph@adamsbroadwell.com)  
[tgulesserian@adamsbroadwell.com](mailto:tgulesserian@adamsbroadwell.com)  
[eklebaner@adamsbroadwell.com](mailto:eklebaner@adamsbroadwell.com)

**INTERVENORS**

\*Imperial County Planning and  
Development Services  
Armando Villa,  
Planning Director  
801 Main Street  
El Centro, CA 92243-2811  
[armandovilla@co.imperial.ca.us](mailto:armandovilla@co.imperial.ca.us)

\*Remy, Thomas, Moose &  
Manley, LLP  
Howard F. Wilkins  
455 Capitol Mall, Suite 210  
Sacramento, CA 95814  
[hwilkins@rtmmlaw.com](mailto:hwilkins@rtmmlaw.com)

**INTERESTED  
AGENCIES/ENTITIES/PERSONS**

Imperial County Planning and  
Development Services  
801 Main Street  
El Centro, CA 92243

Imperial County Air Pollution  
Control District  
150 South 9th Street  
El Centro, CA 92243-2801

Imperial Irrigation District  
333 E. Barioni Boulevard  
Imperial, CA 92251

**ENERGY COMMISSION  
DECISIONMAKERS**

ROBERT B. WEISENMILLER  
Chair and Associate Member  
[rweisenm@energy.state.ca.us](mailto:rweisenm@energy.state.ca.us)

KAREN DOUGLAS  
Commissioner and Presiding Member  
[kldougl@energy.state.ca.us](mailto:kldougl@energy.state.ca.us)

Kenneth Celli  
Hearing Officer  
[kcelli@energy.state.ca.us](mailto:kcelli@energy.state.ca.us)

**ENERGY COMMISSION STAFF**

Bob Worl  
Project Manager  
[rworl@energy.state.ca.us](mailto:rworl@energy.state.ca.us)

Jeff Ogata  
Assistant Chief Counsel  
[jogata@energy.state.ca.us](mailto:jogata@energy.state.ca.us)

**ENERGY COMMISSION  
PUBLIC ADVISER**

Jennifer Jennings  
Public Adviser  
*e-mail service preferred*  
[\\*publicadviser@energy.state.ca.us](mailto:publicadviser@energy.state.ca.us)