

**DOCKET**

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STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of:

Complaint & Investigation )

Jurisdictional Determination Regarding East and )

North Brawley Geothermal Developments )

Docket No. 11-CAI-02

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**OPPOSITION OF ORMAT NEVADA, INC.  
TO  
PETITION FOR RECONSIDERATION OF COMMISSION DECISION  
AND ORDER NO. 11-1130-4 BY  
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

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January 20, 2012

STATE OF CALIFORNIA

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**OPPOSITION OF ORMAT NEVADA, INC. TO PETITION FOR RECONSIDERATION  
OF COMMISSION DECISION AND ORDER NO. 11-1130-4 BY CALIFORNIA UNIONS  
FOR RELIABLE ENERGY**

Pursuant to the *Notice of Hearing on Petition for Reconsideration and Opportunity to Comment* issued by the California Energy Commission (“Commission”) on January 5, 2012, Ormat Nevada, Inc. (“Ormat”) hereby submits this opposition to the *Petition for Reconsideration of Commission Decision and Order No. 11-1130-4 by California Unions for Reliable Energy* (“Petition”).

**I. California Unions for Reliable Energy’s (“CURE”) Petition Fails to Meet the Standard for Reconsideration Set Forth in the Commission’s Regulations.**

Section 1720 of the Commission’s Regulations requires that a petition for reconsideration of a Commission decision or order set forth either (1) new evidence that despite the diligence of the petitioning party could not have been raised during evidentiary hearings or (2) an error or change of law or an error in fact in the decision or order. CURE’s Petition fails to meet this standard. CURE’s Petition does not set forth new evidence, nor does it set forth a change of law supporting reconsideration of Order No. 11-1130-4 (“Commission Order”). CURE’s Petition does not allege any error of law in the Commission Order, which found that CURE failed to meet

its burden to prove the allegations in CURE’s Complaint that the net generating capacities of the North Brawley Geothermal Project (“North Brawley”) and the East Brawley Geothermal Project (“East Brawley”) are 50 megawatts or more, or that the two facilities constitute a single facility subject to the Commission’s jurisdiction. Finally, CURE’s Petition fails to allege any error in fact set forth in the Commission Order. CURE’s Petition should be denied for failing to meet the standard set forth by the Commission’s regulations.

**A. CURE’s Petition Asserts Two Conflicting Challenges to the Commission Order, However Neither Challenge Constitutes a Sufficient Basis for Reconsideration.**

Rather than attempting to meet the Commission’s standard for reconsideration, CURE offers two conflicting challenges to the Commission Order. On one hand, CURE alleges that the Commission violated the Warren Alquist Act by “ignor[ing] the generating equipment authorized by the North Brawley conditional use permit and the generating equipment proposed in the East Brawley conditional use permit.”<sup>1</sup> On the other hand, CURE faults the Commission for considering “factors [not] legally relevant to a plant’s generating capacity”, such as the “County’s conditional use permit conditions,” to determine that the Commission lacked jurisdiction over both North Brawley and East Brawley.<sup>2</sup> CURE appears confused as to whether it expects the Commission to consider (or not) the conditional use permit of North Brawley and the conditional use permit application for East Brawley in determining the net generating capacity of the powerplants.

However, notwithstanding these logical fallacies, neither challenge constitutes a sufficient basis to justify reconsideration of the Commission Order as CURE’s arguments are based on an incorrect presentation of the factual evidence in the evidentiary record.

Furthermore, neither argument disputes the Commission’s determination, made as a matter of

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<sup>1</sup> CURE Petition, p. 2.

<sup>2</sup> CURE Petition, p. 4.

law, that CURE failed to meet its burden to prove the allegations in its Complaint. Therefore, CURE's Petition should be denied.

**1. CURE's Petition Misrepresents the Evidence in the Evidentiary Record Relating to North Brawley.**

CURE asserts that the Commission Order violates the Warren Alquist Act for failing to recognize that "Ormat holds a permit authorizing construction of a 59 megawatt thermal powerplant at the North Brawley site."<sup>3</sup> As explained in detail in Ormat's Reply Brief, CURE's allegation that Ormat has a legal right to build a powerplant larger than 49.9 megawatts is completely without evidentiary support.<sup>4</sup>

The conditional use permit for North Brawley authorizes Ormat to construct a 49.9 net megawatt binary power plant, and that any increase in generating capacity would require additional permitting.<sup>5</sup> This fact is undisputed.<sup>6</sup> The evidentiary record clearly establishes that although Ormat had the authorization from Imperial County to construct a 49.9 net megawatt facility utilizing six Ormat Energy Converters ("OECs"), because the OECs are custom designed based on the resource, Ormat determined that only five OECs would be required to utilize the authorized permit amount of 49.9 net megawatts.<sup>7</sup> The conditional use permit for North Brawley specifically states "expanding the geothermal power plant beyond 49.9 MW and/or supplemental activities requiring additional major equipment or facilities shall require separate permits."<sup>8</sup> Clearly, Ormat does not "hold a permit authorizing construction of a 59 megawatt" North

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<sup>3</sup> CURE Petition, p. 1.

<sup>4</sup> Reply Brief of Ormat Nevada, Inc., 11-CAI-02 pp. 17-18 (Oct. 19, 2011).

<sup>5</sup> Ex. 200, Appendix D, p. 7, S-1(a).

<sup>6</sup> CURE's own witness, Mr. David Marcus, testified that Ormat would be required to undergo additional permitting for North Brawley in order to increase the net generating capacity above 49.9 megawatts:

MR. MARCUS: I said that my recollection, based on seeing the document in passing, since it wasn't what I was focusing on, was that there was a condition requiring Ormat to go back to the county for an amendment to the CUP if they wanted to increase the output above 49.9 megawatts.

<sup>7</sup> 9/26/11 RT 238:5-8.

<sup>8</sup> Ex. 200, Appendix D, p. 7, S-1.

Brawley facility. A mere statement in CURE’s Petition does not constitute evidence, let alone “new evidence” sufficient to support a petition for reconsideration. Furthermore, a statement in CURE’s Petition, which is directly contradicted by the testimony of CURE’s own witnesses, Imperial County’s witnesses, and Ormat’s witnesses, is not sufficient to show an error of fact in the Commission Order. Therefore, as CURE’s insistence on perpetuating this unfounded argument does not constitute new evidence, or an error of fact sufficient to form a basis for reconsideration, CURE’s Petition should be denied.

**2. CURE’s Petition Misrepresents the Evidence in the Evidentiary Record Relating to East Brawley.**

CURE asserts that the Commission Order violates the Warren Alquist Act for failing to recognize that “Ormat . . . applied for a permit authorizing the construction of a 59 megawatt thermal powerplant at the East Brawley site.”<sup>9</sup> This is a blatant misrepresentation of the evidence. The record is clear that the conditional use permit application for East Brawley is for a “49.9 net megawatt geothermal power plant consisting of up to six OEC binary generating units.”<sup>10</sup> CURE disregards the clear language in the conditional use application regarding the 49.9 megawatt size of the facility and the “up to six” description of the number of OEC’s that may be installed at East Brawley in its effort to find fault with the Commission Order. CURE’s mere assertion that Ormat “applied” for a 59 megawatt powerplant at the East Brawley site does not meet Section 1720’s requirements for a petition for reconsideration, as a misrepresentation of the evidentiary record does not constitute new evidence, nor does it indicate an error in fact or of law in the Commission Order. Therefore, CURE’s Petition should be denied.

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<sup>9</sup> CURE Petition, p. 1.

<sup>10</sup> Ex. 200, Appendix B, p. 2 [emphasis added].

## **II. The Commission Should Sanction CURE and Require Payment of Reasonable Fees to Ormat.**

The California Public Utilities Commission, a sister agency of the Commission, has a rule of practice and procedure that states “Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act...agrees ....never to mislead the Commission or its staff by an artifice or false statement of fact or law” (“Rule 1”).<sup>11</sup> As shown above, the factual statements set forth in CURE’s Petition are simply false, so false that CURE never even attempted to offer evidence in support of these statements, and in fact, witnesses provided evidence contradicting CURE’s statements regarding the generating capacity authorized by the North Brawley conditional use permit.

Whether or not the Commission has a written rule of practice equivalent to Rule 1, Ormat believes that the Commission has the authority to reprimand or sanction parties who abuse the process by misleading the Commission through false statement of fact. Such sanctions appear appropriate in this instance.

Further support for the Commission’s authority to reprimand CURE can be found in the California Administrative Procedure Act, which provides that:

The presiding officer may order a party, a party’s attorney or other authorized representative, or both, to pay reasonable expenses, including attorney’s fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.<sup>12</sup>

Frivolous is defined as “totally and completely without merit” or “for the sole purpose of harassing an opposing party.”<sup>13</sup> In this case, filing a petition for reconsideration based on clear

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<sup>11</sup> California Public Utilities Commission Rules of Practice and Procedure, Rule 1.

<sup>12</sup> Cal. Govt. Code § 11455.30

<sup>13</sup> Cal. Code. Civ. Pro. § 128.5.

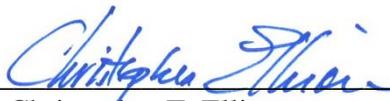
misrepresentations of the facts meets the definition of “totally and completely without merit.” Ormat requests that the Commission order CURE to pay the reasonable expenses, including attorney’s fees, incurred by Ormat as a result of CURE’s actions.

**CONCLUSION**

The Commission should deny CURE’s Petition for failing to meet the standards for reconsideration set forth in Section 1720 of the Commission’s Regulations. CURE has failed to set forth new evidence, or an error of fact or change or error in law necessary to support reconsideration of the Commission Order denying CURE’s Complaint against Ormat. Ormat also respectfully requests that the Commission reprimand CURE for filing a frivolous complaint based on misrepresentations of the factual record, and issue such sanctions or orders that the Commission deems appropriate.

January 20, 2012

Respectfully submitted,

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CALIFORNIA UNIONS FOR RELIABLE )  
ENERGY )  
\_\_\_\_\_ )

**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on January 20, 2012, I served the attached *Opposition of Ormat Nevada, Inc. to Petition for Reconsideration of Commission Decision and Order No. 11-1130-4 by the California Unions for Reliable Energy* 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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**11-CAI-02**

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