STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	Docket No. 07-AFC-6
	)	
Application for Certification for the	)	
Carlsbad Energy Center Project	)	
	)	
	)	

ENERGY COMMISSION STAFF'S REPLY TO MOTIONS FOR OFFICIAL NOTICE

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June 10, 2011

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I. Introduction

On June 1, 2011, the City of Carlsbad (City) filed a Motion to Take Official Notice of testimony from San Diego Gas and Electric (SDG&E) regarding power purchase agreements (PPAs) that the utility proposes to enter into. The SDG&E testimony was filed at the California Public Utilities Commission (CPUC). The PPAs recommended in the testimony pertain to three peaker power plants that are proposed for the San Diego reliability area.

On June 8, 2011, the Center for Biological Diversity (CBD) filed a Motion to Take Official Notice of no fewer than 17 documents, several of which are very lengthy, identified as Exhibits A through Q. These documents include ones from the California Independent System Operator (CAISO), as well as news articles from various publications.

As discussed below, many of the documents subject to these motions are not eligible for official notice pursuant to the California Energy Commission's (Energy Commission) regulations and the California Evidence Code. Those documents that are eligible have at best marginal relevance, or are filed inexplicably late in a proceeding that re-opened the evidentiary record for further hearings less than one month ago.

II. Documents That May Be Officially Noticed

The Energy Commission's provision for official notice is set forth in Title 20, Section 1213, of the California Code of Regulations:

> During a proceeding the commission may take official notice of any generally accepted matter within the Commission's field of competence, and of any fact which may be judicially noticed by the courts of this state. . . .

This regulation, which is similar to that of other state and federal agencies, is informed by the provisions of the California Evidence Code, which sets forth the matters that courts either must judicially notice (Evid. Code, § 451), or those that the courts have discretion to notice. (Evid. Code, § 452.) The mandatory judicial notice provisions of Evidence Code Section 451 clearly have no application to any of the documents subject to the motions for official notice, as that provision pertains to the state and federal constitutions, items mandated to be officially noticed by statute, federal judicial rules, and so forth. Evidence Code Section 452 likewise puts strict limits on the items subject to discretionary judicial notice:

> Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451.
>
> > (a) The decisional, constitutional, and statutory law of any state of the United states and the resolutions and private acts of ;the Congress . . . and Legislature of this state.
> > (b) Regulations and legislative enactments issued by . . . the United States . . . .
> > (c) Official acts of the legislative, executive, and judicial departments of; the United states and of any state . . . .
> > (d) Records of court . . . .
> > (e) Rules of court . . .
> > (f) The laws of an organization of nations and of foreign nations . . .
> > (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
> > (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Judicial notice may not be taken of any matter unless authorized or required by law. (Evid. Code, § 450.)

III. The City's Motion: The Energy Commission May Take Official Notice If It Believes The Document Is Timely and Relevant.

The SDG&E document that the City seeks to have officially noticed falls into none of the categories for discretionary judicial notice set forth in Evidence Code section 452. (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 856, fn. 2 [Evid. Code section 452(c) does not apply to papers filed by private parties with state and federal agencies].) Thus, the document can only be noticed to the extent that it contains "any generally accepted matter within the Energy Commission's field of competence."

The SDG&E document indicates the utility's intent to enter into PPAs for three peaker power plants in the San Diego area. The Energy Commission's role in resource planning is certainly an area within the Energy Commission's field of competence. The utility's proposal to enter into these PPAs can be described as "generally accepted"; certainly the resource planning staff, and presumably the Commissioners as well, are aware of the utility proposal. Thus, the Energy Commission may, in its discretion, take official notice of the SDG&E filing if it chooses to do so. In considering whether to do so, it should consider on balance the very late date of the motion, and the applicant's due process right to have opportunity to respond to such. (Govt. Code, § 11424.10(a)(1) ["Administrative Adjudication Bill of Rights"].)

More important, the Energy Commission must consider the relevance of any document that it would officially notice. (1 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar 3d ed. 1998) Judicial Notice, § 47.6, p. 1122.) Staff believes the relevance of the document to any determination the Energy Commission may make is at best doubtful.
The City's motion suggests that it believes that the SDG&E filing shows that CECP is not "needed," or alternatively, that the benefits ascribed to the project (the shutdown of the older, less efficient Encina Power Station units, and reductions in once through cooling impacts) will be realized without CECP. However, to reach this conclusion, the City makes important leaps of faith. For example, such a conclusion assumes (1) that the identified projects will in fact receive PPAs; (2) that the identified projects (one of

which recently applied for a Energy Commission permit, the second of which has not, and the third being subject to local permitting) will in fact be permitted and constructed; (3) that the identified projects will rely on the same emission reduction credits, requiring the shutdown of EPS units 1-3; and (4) that additional unidentified projects will emerge to satisfy remaining reliability needs.

The City's preferred assumptions may eventually turn out to be correct, but such is unknowable at this time given, to use CBD's words, "the passage of time and the changing circumstances of the California electricity system." Since de-regulation in the 1990s, the Energy Commission's decisions make no finding regarding "need" for a project. However, the City should know, and the Commissioners certainly do, that need for new generation projects is a knotty issue, determined in iterative steps that culminate with decisions on power purchase agreements made (for projects selling to the investor-owned utilities) by the CPUC. If other projects are found preferable for providing the benefits CECP would otherwise provide, based on cost or other considerations, CECP will not get a PPA and will presumably not be built. However, if CECP does ultimately succeed in getting a PPA, it will be because it provides or contributes to the benefits that Staff has identified, and that the Presiding Member's Proposed Decision acknowledges.

IV. CBD's Motion Pertains to Documents Ineligible for Official Notice, Documents That Could Have Been Produced Timely but Were Not, and Documents of Marginal or No Relevance.

One week prior to the decision hearing, and three weeks following the final evidentiary hearing, CBD has produced a number of documents for which it seeks official notice. Many if not most of the documents were previously available, some for more than a year, making the motion untimely. Most of the documents (Exhibits A through F) are directed to the issue of "need," and are thus subject to the same considerations mentioned above with regard to the City's motion for official notice. Moreover, several of the documents (A-D) from the CAISO would be merely cumulative, inasmuch as intervenor Terramar has already, at the May 19 hearing and without objection,

introduced CAISO documentation that the RMR contracts for EPS were terminated in 2010. The replacement of the RMR contracts with a separate tolling arrangement for EPS services was discussed at the May 20, 2011, hearing by representatives for the applicant.

As previously mentioned, Exhibits A through E are CAISO documents, and therefore presumably subject to notice as "official acts" of a government agency pursuant to Evidence Code section 451, subdivision (c). However, because they are lengthy, late, and cumulative, Staff recommends that they not receive official notice.

CBD's proposed Exhibits I and J are recent CAISO reports on renewables integration and the ability of the current transmission system to integrate renewables at 20 percent (Exh. I) and 33 percent (Exh. J). CBD states that these documents "counter assertions made in the PMPD that more gas-fired generation is needed as more renewables are added to California's electricity system." (CBD Motion, p. 4.) The Committee spent significant hearing time on this issue. The CAISO provided a witness, a former power plant operator, to explain how CECP, with its fast ramping ability, is beneficial to a system that will have increasing amounts of intermittent renewable generation. The recent May 19 hearing also had a CAISO representative urging approval of CECP because of the flexibility with which it addresses fluctuating demand. Staff finds nothing in proposed Exhibits I and J that is inconsistent with the CAISO position on CECP.

CBD exhibits G and H are both from 2010. CBD alleges that the documents show that the use of liquefied natural gas (LNG) is likely and occurring in the San Diego region.[1] Staff believes these documents are irrelevant to the issue they purportedly address—whether the project results in a significant adverse impact because of greenhouse gas

[1] Staff questions whether the documents actually show this. Exhibit G is a 2010 air district document indicating that the infrastructure for such imports is in place, and could be utilized easily, subject to changes in the LNG market. Exhibit H is an unidentified document that merely indicates (so far as Staff can tell) that an LNG shipment was offloaded at the Mexican Costa Azul facility in 2010. Neither exhibit indicates that LNG is likely to displace abundant and cheaper national gas supplies over the long run. Moreover, CBD's proposed Exhibit P indicates that LNG use in San Diego during the past year was less than five percent of gas consumed.

(GHG) emissions. The evidence of record is that CECP would be much more efficient than the facilities that it will replace or displace in the loading order, and that its addition to the system would result in an overall reduction in GHG emissions. Even if one assumes (as Staff does not), for argument, that LNG is the fuel of the future in San Diego, and one further assumes that LNG combustion has higher "lifecycle" GHG emissions than native gas, this merely means that the reduction of GHG emissions from a newer, more efficient power plant has greater magnitude. In other words, if LNG is in fact a "dirtier" fuel that is likely to be used, it is far better to generate electricity with efficient infrastructure that will burn less of it. CBD proposed exhibits G and H (the latter not identified) are late-filed and irrelevant. They should not be officially noticed.

CBD proposed Exhibit K is a news article regarding the Energy Commission's licensing of two power plants, the Mariposa and Oakley AFCs. CBD states that official notice of this news article is appropriate because it indicates that two approved plants "were not considered in the cumulative impacts analysis for the PMPD." (CBD Motion, p. 4.) This rationale makes no sense. If the issue is critieria air pollutants, the projects are in air basins separated by hundreds of miles. If the issue is GHG impacts, these emissions are a cumulative global environmental phenomenon, with emissions in China or India, or anywhere else in the world, contributing to climate change no less than GHG emitted in California. News articles are not judicially noticeable, although these matters (projects the Energy Commission has licensed) are certainly "generally accepted" and "within the Commission's field of competence." Thus, Exhibit K can be officially noticed if it is relevant to an issue before the Energy Commission. Staff believes that it is not relevant, and should not be officially noticed.

CBD proposed exhibits L through Q are also news articles, only one of them recent. They pertain to different subjects regarding energy, including the closure of South Bay power plant, the cost of solar photovoltaic installations, and LNG. These exhibits are

not timely, of questionable relevance, and cannot be noticed consistent with Evidence Code provisions. They should not be officially noticed.

Dated: June 10, 2011

Respectfully submitted,

/S/

RICHARD C. RATLIFF
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APPLICATION FOR CERTIFICATION FOR THE *CARLSBAD ENERGY CENTER PROJECT*

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 5/18/2011)

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*indicates change

DECLARATION OF SERVICE

I, Chester Hong, declare that on June 10, 2011, I served and filed copies of the attached ENERGY COMMISSION STAFF'S REPLY TO MOTIONS FOR OFFICIAL NOTICE, dated June 10, 2011. The original document filed with the Docket Unit, 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/sitingcases/carlsbad/index.html].

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

____ by personal delivery;

__X__ by delivering on this date, for mailing with the United States Postal Service with first-class 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 preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury 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/
CHESTER HONG

*indicates change