BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of: The Application for Certification for the **CHULA VISTA ENERGY UPGRADE PROJECT**	Docket No. 07-AFC-4

REPLY BRIEFING STATEMENT OF THE CITY OF CHULA VISTA
SCOTT TULLOCH, INTERIM CITY MANAGER
November 19, 2008

DOCKET
07-AFC-4
DATE NOV 19 2008
RECD. NOV 19 2008

City of Chula Vista
276 Fourth Avenue
Chula Vista CA 91910

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of: The Application for Certification for the **CHULA VISTA ENERGY UPGRADE PROJECT (CVEUP)**	Docket No. 07-AFC-4

REPLY BRIEFING STATEMENT OF THE CITY OF CHULA VISTA
SCOTT TULLOCH, INTERIM CITY MANAGER

I. Introduction

On October 10, 2008, the California Energy Commission (CEC) assigned Commissioners (Committee) established the briefing topics and schedule with a due date of November 19, 2008 for Reply Briefs.

In the November 5, 2008 Brief, the City reiterated its request to the Committee to incorporate the six Conditions proposed by the City and Applicant (Exhibit 21 and Exhibit 803) into the Proposed Decision. The Conditions were the product of direction by CEC Staff to the Applicant and Interveners to work out their differences during the Issues Resolution and Staff Assessment Workshops. Exhibits 21 and 803 are the only written response to that direction and the only proposal established during the public process that directly addresses local project effects and community concerns raised during the public process, should the Application For Certification be granted. The City's additional commitment to re-invest future project tax revenues in neighborhood infrastructure (Attachment B[1]), also respond directly to many of the concerns regarding the existing neighborhood and project issues voiced by members of the community during the process. If the project is approved, the City will take that proposal to the community for their review and prioritization.

The City's Opening Briefing established that the proposed Conditions were made available to the public for review and comment at several well attended public meetings early in the process. Neither the Interveners nor members of the public have challenged the individual Conditions except to compare their totality to their preference for the no project alternative. Conversely, local residents testimony documents concerns regarding the lack of and quality of infrastructure which are specifically addressed by the Conditions proposed by the City and agreed to by the Applicant in writing. Absent any other proposals by Interveners or the public, securing the implementation of the proposed Conditions as conditions to project approval is fundamental to responding to community concerns, short of adopting the no project alternative.

Applicant's Opening Brief

On page 42 of their Brief the Applicant states that;

"MMC will also provide the benefit of being subject to the City's Utility Users' Tax (UUT) despite Federal Energy Regulatory Commission determinations regarding the electric portion of the UUT otherwise. (Ex. 21 at 2 and Ex. 200 at 4.9-6.)"

The City appreciates the Applicants cooperation on the record, regarding this issue. Their written Agreement (Exhibit 21) and testimony to remit the UUT to the City is established without qualification or condition. The Applicant's interpretation of a FERC "determination," on UUT in the Opening Brief was submitted without reference or justification and was not admitted during the Evidentiary process. The City respectfully requests it be stricken from the record.

The City also wishes to clarify the introduction of the Special Use Permit for the existing MMC 44 MW facility. CEC Staff appropriately describes the City discretionary permit process and related issues. The existing facility was processed as a Special Use Permit, which was the process used for projects in the redevelopment area at the time, and similar to the Conditional Use Permit process used for projects outside the redevelopment area. City staff determined that the original peaker plant application was allowable as an unclassified use and issued the discretionary permit subsequent to the standard public process, which was not challenged. The process used to establish the existing SUP is representative of the process the City would use if it were the lead agency on the CVEUP.

Mr. Tulloch's Statement

When the current CVEUP was submitted to the City, the City Manager's Office and the Attorney's Office contacted the CEC to determine under whose jurisdiction the application should be processed. The CEC referenced state guidelines and asserted their authority to process the application in its entirety, clarifying that the City would not be required to process any form of permit for the project. The City notified the Applicant and the Applicant withdrew its application to the City and resubmitted a revised application to the CEC. The City's actions throughout the process and response to the Committee's question regarding the potential need for additional local permits during the Evidentiary Hearing was based on that CEC determination.

The City would not substitute its judgment regarding the CEC's unique process or that of the Air Pollution Control District subject expertise or that of any of the technical subject experts that make up the CEC's extensive Staff and consultant team. The City is participating first to assist the CEC in making the process as open, transparent and inclusive as possible, and second as an Intervener to ensure that the AFC process is implemented as required, to review and assess the information submitted by technical experts, listen to input provided by members of the public, and represent the interest of the entire community. Regardless of the outcome, the number of local meetings and the robust attendance at each of those meetings represents a successful and collaborative effort by the CEC and City to provide the public with an open, transparent and inclusive process under CEC guidelines. Subject to the incorporation of the proposed Conditions supported by the City and Applicant, as conditions of approval to the AFC, the City believes that CEC staff has implemented a process consistent

with CEC guidelines and the process the City would have conducted under CEQA guidelines and local ordinances, regulations and standards had it been the lead agency.

Conclusion

As the lead agency, the CEC has final authority and responsibility for the decision to grant or not grant the AFC. Should the Commission grant the AFC, fully incorporating the proposed Conditions would be consistent with the intent and spirit of the collaborative public process established by the CEC, it would ensure their implementation and provide the community with the benefits of a publicly evaluated proposal that complements the CEC Conditions with local value. Based upon the Applicant's written agreement to incorporate the subject Conditions and based upon the nexus and rough proportionality in applying the subject Conditions to mitigate impacts to the community (see *Nolan*/*Dolan*), the Committee and ultimately the full Commission have express authority to address the community's concerns by incorporating the Conditions in their respective Decisions.

The City respectfully urges the Committee to strike the applicants reference to the FERC regarding UUT from the record and adopt the proposed Conditions in Exhibit 21 and Exhibit 803 as Conditions of Certification for the CVEUP.

[1]Attachment B is a map that identifies potential infrastructure improvements in the area immediately adjacent to the proposed project. The City Manager approved the concept of reinvesting future tax increment generated from the proposed project into infrastructure improvements in the immediate area. Staff subsequently submitted the map to the Chula Vista Redevelopment Corporation along with the concept of utilizing Southwest United in Action, a neighborhood residential and business based group, to recommend project priorities for infrastructure investment, should the CEC decide to approve the project.

MMC Energy, Inc.
26 Broadway, Suite 907, New York, NY 10004
www.mmcenergy.com

August 4, 2008

Christopher Meyer
Project Manager
California Energy Commission
1516 9th Street, MS-15
Sacramento, CA 95814

Re: **Chula Vista Energy Upgrade Project (Docket No. 07-AFC-4): Agreement with the City of Chula Vista on Mitigation and Consistency of the Project with the Chula Vista General Plan**

Dear Mr. Meyer:

This letter describes the specific mitigation MMC Energy, Inc. ("MMC") has agreed to provide to the City of Chula Vista ("City") for the benefit of the citizens of Chula Vista and the residents and businesses located close to the Chula Vista Energy Upgrade Project ("Project"). The specified mitigation would be provided in conjunction with the proposed Project in connection with a California Energy Commission ("Commission") decision to grant a license to MMC for this Project. This letter also describes MMC's understanding of the City's position that the Project is consistent with the City's General Plan.

Agreements as to Specific Mitigation Measures

As you know, it is critical to the City to obtain focused benefits for the residents and businesses surrounding MMC's proposed Project. Therefore, MMC has agreed to the City's request that MMC provide all of the following mitigation measures:

1. Provide $210,000 in direct funds to the City, in addition to the funds to be contributed as noted in Paragraph 2 below, for air quality related mitigation for the local area. This contribution from MMC will give the City the ability to use these funds in the affected local community for energy efficiency and related improvements to homes and local businesses. These funds are intended to directly benefit the local residents potentially most directly affected by the reconstructed plant and shall be payable to the City within 30 days of the CEC final decision regarding CVEUP .

2. MMC hereby agrees to fund the estimated cost of mitigating the air emissions from the Project to a 1:1 ratio at the level outlined in the Final Staff Assessment and at the fixed cost of $210,000 established by the CEC. MMC also agrees that to the extent possible the mitigation should take place in southern Chula Vista. The City may propose specific projects to the Commission to achieve an equivalent level of emissions reductions. If these alternative project(s) are determined by the California Energy Commission Staff ("Staff") to provide legally enforceable and sufficient mitigation that satisfies the requirements of the Warren-Alquist Act and the California Environmental Quality Act, MMC will provide $210,000 to the City in addition to the $210,000 described in

Paragraph 1 above. Should the City of Chula Vista be unable to identify a project within two years of the final California Energy Commission decision on the Project that meets the CEC staff criteria for meeting the 1:1 offset requirements, the $210,000 will be contributed to the Carl Moyer program administered by the San Diego Air Pollution Control District. MMC's obligation for this issue shall be limited to the timely payment of the funds.

3. MMC acknowledges and agrees that pursuant to the Chula Vista Municipal Code, the proposed Project is subject to the City's utility users' tax ("UUT"). MMC further acknowledges and agrees that MMC and its successors or assignees are subject to UUT and hereby agree to remit such tax to the appropriate franchise natural gas, electricity and/or telecommunications service provider in accordance with the City's Municipal Code.

   Additionally, MMC agrees that in the event that, for whatever reason, the UUT payable by MMC directly to the City or through the franchise agent, direct access or other service provider, is determined by a court of competent jurisdiction to be invalidly imposed or collected, MMC agrees to comply with any and all appropriate modifications to the City's Municipal Code or franchise agreement to cure such invalidity so as to continue the payment of equivalent value or consideration to the City throughout the term of the CVEUP's operation.

4. MMC hereby agrees to provide the City with funding for the equipment, software and installation costs to establish an additional wireless Evapotranspiration weather station at an actual not to exceed cost of $30,000. MMC's understanding is that its obligation for mitigating the use of potable water in the Project shall be limited by mutual agreement of the Commission and the City to providing the funding. MMC therefore expects that upon providing the funds that the City will implement the Water Conservation Program in a timely manner and upon request, the City shall provide MMC with copies of any data requested by the Commission to verify project implementation and/or the amount of water conserved. Funding for this measure shall be payable to the City within 30 days of receiving a detailed invoice from the City but no sooner than 30 days following CEC final decision regarding CVEUP

5. Once the new 100-MW Project is operational, MMC hereby agrees to shut down and remove the existing 44.5-MW facility. MMC will not seek permission from the Commission for any expansion of the Project beyond the generation capacity set forth in the AFC.

6. At this time MMC has elected not to proceed with upgrades to the existing transmission system on lines TL649A and TL644. Should MMC, SDG&E or the CAISO desire to upgrade the portion of TL 649A along Albany Avenue between Main Street and Orange Avenue in the future, MMC will consult with the City to determine if the City would like to underground this portion of TL 649A. Should the City desire to underground those lines, MMC will pay for half of the additional cost required to place those transmission lines below ground. This agreement will avoid half the undesirable outcome of MMC's improvements increasing the cost of future efforts by the City to underground these lines.

This agreement shall be included in a condition of certification from the Commission on the Project.

It is MMC's understanding that the City believes these benefits when combined with the requirements included in the Preliminary Staff Assessment will reduce and mitigate air quality and water use impacts, and provide specific, targeted benefits to the nearby residents and businesses.

Compliance of the Project with the City's General Plan

It is MMC's understanding that the City agrees with the following discussion and conclusions regarding the City's General Plan. The City evaluates a project's consistency with the General Plan by looking at whether the project is in harmony with the policies stated in the General Plan. Because the General Plan reflects a wide range of competing interests, the City weighs and balances the plan's policies when determining weather on balance a project is consistent with the General Plan. A project need not be in complete conformity with each and every policy of the General Plan to be deemed consistent with the General Plan because it is likely that no project would completely satisfy every policy stated in the General Plan. The policies of concern E6.4 and E6.15 address impacts to nearby sensitive receptors. Based upon the preliminary analyses and requirements presented by Staff in the Preliminary Staff Assessment, the analysis and requirements contained in the District's Final Determination of Compliance and the specific benefits and mitigation described above, we believe that the City will find that the Project is in harmony with and therefore, consistent with the City's General Plan.

By copy of this letter to Mr. Scott Tulloch of the City, we request that the City notify you of its concurrence with the proposed additional mitigation and conclusions regarding the City's General Plan contained in this letter.

Very truly yours,

Harry Scarborough

cc: Scott Tulloch (via e-mail)

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE CHULA VISTA ENERGY UPGRADE PROJECT	DOCKET NO. 07-AFC-4 **PROOF OF SERVICE** **(Revised 7/14/08)**

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-14
Sacramento, CA 95814-5512
docket@energy.state.ca.us

Harry Scarborough Vice President MMC Energy Inc. 11002 Ainswick Drive Bakersfield, CA 93311 hscarborough@mmcenergy.com	Douglas M. Davy, Ph.D. Senior Project Manager CH2M Hill 2485 Natomas Park Drive, Suite 600 Sacramento, CA 95833 ddavy@ch2m.coom
Steven Blue Project Manager Worley Parsons 2330 E. Bidwell, Suite 150 Folsom, CA 95630 steven.blue@worleyparsons.com	Jane Luckhardt, Esq. Downey Brand LLP 555 Capitol Mall, 10th Floor Sacramento, CA 95814 jluckhardt@downeybrand.com
California ISO P.O. Box 639014 Folsom, CA 95763-9014 e-recipient@caiso.com	

California Unions for Reliable Energy (CURE) c/o Marc D. Joseph Gloria Smith Suma Peesapati Adams, Broadwell, Joseph & Cardozo 601 Gateway Blvd., Suite 1000 South San Francisco, CA 94080 mdjoseph@adamsbroadwell.com gsmith@adamsbroadwell.com speesapati@adamsbroadwell.com	City of Chula Vista, California c/o Charles H. Pomeroy Caren J. Dawson McKenna, Long & Aldridge, LLP 444 South Flower Street Los Angeles, CA 90071 cpomeroy@mckennalong.com cdawson@mckennalong.com
Environmental Health Coalition Diane Takvorian & Leo Miras 401 Mile of Cars Way, Suite 310 National City, CA 91950 DianeT@environmentalhealth.org LeoM@environmentalhealth.org	
ENERGY COMMISSION Jackalyne Pfannenstiel, Chair Presiding Committee Member jpfannen@energy.state.ca.us James D. Boyd, Vice Chair Associate Committee Member jboyd@energy.state.ca.us Raoul Renaud Hearing Officer rrenaud@energy.state.ca.us	Chris Meyer Project Manager cmeyer@energy.state.ca.us Kevin Bell Staff Counsel kbell@energy.state.ca.us Public Adviser's Office pao@energy.state.ca.us

DECLARATION OF SERVICE

I, Lois Navarrot, declare that on August 6, 2008, I deposited copies of the attached **Letter from MMC to Christopher Meyer at CEC Regarding Agreement with the City of Chula Vista on Mitigation and Consistency of the Project with the Chula Vista General Plan** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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

Lois Navarrot

Lois Navarrot

CITY OF
CHULA VISTA

August 7, 2008

OFFICE OF THE CITY MANAGER

Christopher Meyer, Project Manager
California Energy Commission
1516 Ninth St
Sacramento, CA 95814

RE: CVEUP Project 07-AFC-04

Dear Mr. Meyer:

The City of Chula Vista Staff wants to express its appreciation to you and all the California Energy Commission (CEC) staff for their support as the City worked through the Application for Certification process. City Staff is grateful for the CEC's effort to compel all parties to work collaboratively to identify the best alternative for the community and local energy reliability. We also appreciate the open and inclusive approach that the CEC has taken in accommodating the City's requests for information and for providing local opportunities for the community to participate in the process. Community participation will continue to be a critical component of moving forward effectively.

The City Staff has used the opportunity established by the CEC and the input from the community as a basis for working with MMC Inc. (MMC) to craft a portfolio of local mitigation commitments. City Staff believes that adding this portfolio of local commitments to the CEC Staff Assessment conditions will address any potential inconsistencies with the General Plan and makes a good faith effort to address the community's primary concerns. The measures and commitments in the enclosed letter from MMC take into consideration the Certification Process and the San Diego Air Pollution Control District (District) Report statements regarding the impacts, or lack of impacts from the proposed project and the corresponding recommendations. Staff is particularly aware that the District has found that, "the project as proposed will comply with all applicable District rules and regulations if it is constructed and operated in accordance with the information submitted in conjunction with the application(s) for District Authority to Construct, the application for certification submitted to the CEC and the terms and conditions of the FDOC," and " Based on emissions calculations, emissions offsets are not required for this project, Rule 20.2(d)(5)- Emissions Offsets."

Pursuant to these findings by the CEC and San Diego APCD, City Staff joins MMC in recommending that, to the extent possible, the CEC include the measures and commitments contained in the MMC letter as conditions in the Final Staff Assessment, and ultimately the CEC final decision. Subsequent to the Commission adopting the

measures contained in the attached letter and/or the completion of a detailed written agreement between the City and MMC on any of the measures not included in the CEC proposed decision, and timely payment by MMC to implement the measures, the City concludes that any potential inconsistencies with the City's General Plan will have been addressed.

City Staff requests that the CEC notify the City and MMC whether or not staff is able to recommend that the Commission adopt the measures as conditions to the Project's approval, and whether or not they can be added as conditions prior to the next public workshop or hearing. Please feel free to call if you have any questions.

Sincerely,

Scott Tulloch, Assistant City Manager
City of Chula Vista

Enclosure

cc: David R. Garcia, City Manager,
Bart Meisfeld, City Attorney
Harry Scarborough, Vice President Development MMC Inc.

MMC Energy, Inc.
26 Broadway, Suite 907, New York, NY 10004
www.mmcenergy.com

August 4, 2008

Christopher Meyer
Project Manager
California Energy Commission
1516 9th Street, MS-15
Sacramento, CA 95814

Re: **Chula Vista Energy Upgrade Project (Docket No. 07-AFC-4): Agreement with the City of Chula Vista on Mitigation and Consistency of the Project with the Chula Vista General Plan**

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By copy of this letter to Mr. Scott Tulloch of the City, we request that the City notify you of its concurrence with the proposed additional mitigation and conclusions regarding the City's General Plan contained in this letter.

Very truly yours,

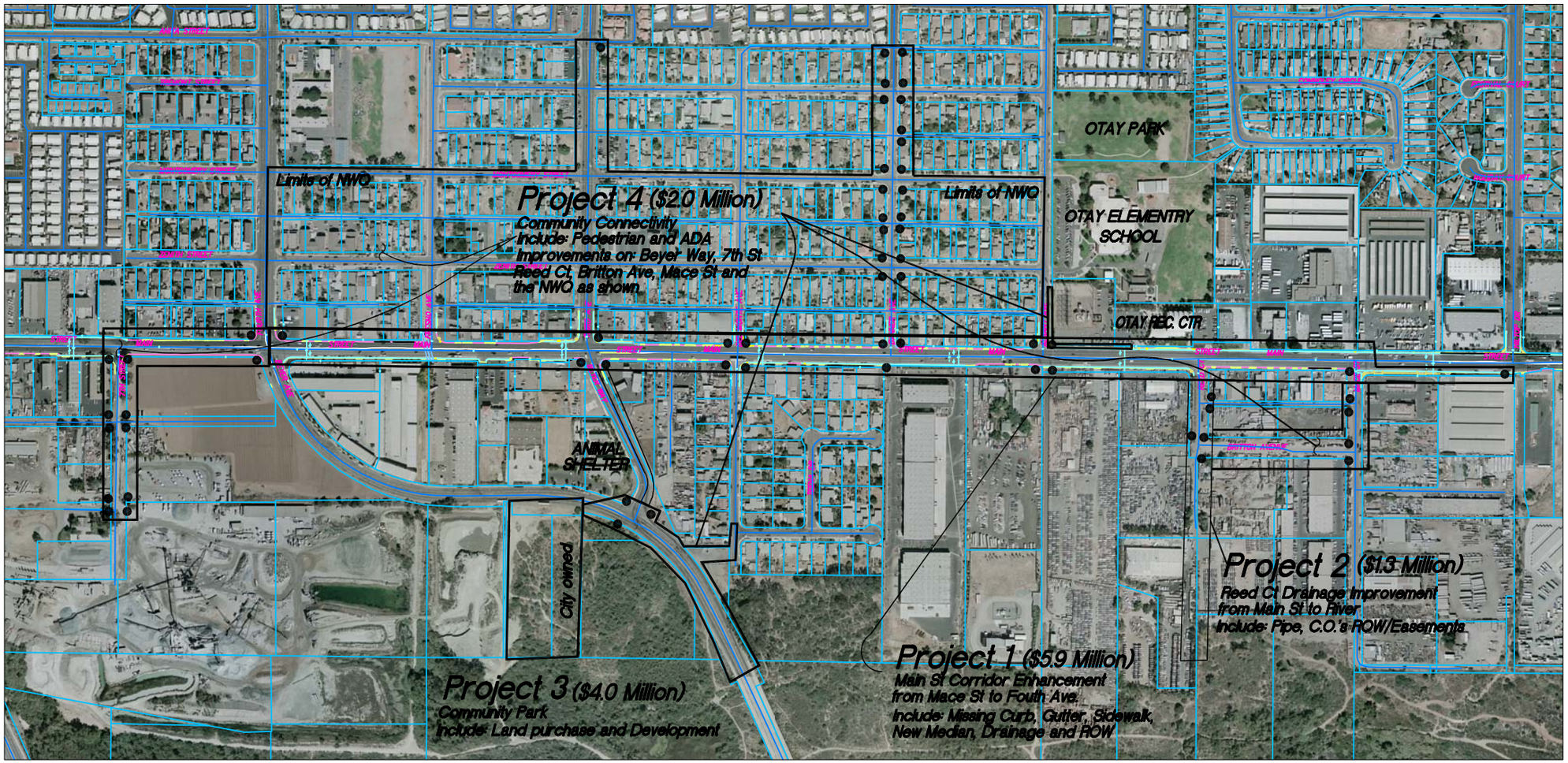
Harry Scarborough

cc: Scott Tulloch (via e-mail)

Attachment B

TAX INCREMENT INVESTMENTS

(STAFF DRAFT)



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CIP # XXXXX

CONSTRUCTION RECORD	REFERENCES	By	REVISIONS	Date	App'd	DATUMS	SCALE								
CONTRACTOR:						VERTICAL DATUM:	HORIZONTAL 1" = 200'	Office:	Designed By:	Drawn By:	Checked By:	Submitted:	Approved:	CITY OF CHULA VISTA ENGINEERING DEPARTMENT	DRAWING NO.
INSPECTOR:						HORIZONTAL DATUM:	VERTICAL	Field:	Plans Prepared Under Supervision Of:	Date:		By: Senior Civil Engineer	By: City Engineer	TAX INCREMENT INVESTMENTS STAFF DRAFT	00-000
DATE COMPLETED:								Traffic:		R.C.E. No.					SHEET 1 OF 1

Attachment C

Chula Vista Municipal Code:

19.16.040 Height limitations – Exemptions from applicability designated.

Height limitations stipulated in this title shall not apply:

A. To church spires, belfries, cupolas and domes, monuments, electric generating stations and liquefied natural gas tanks, water towers, fire and hose towers, observation towers, distribution and transmission towers, lines and poles, windmills, chimneys, smokestacks, flagpoles, radio towers, masts and aerials, or to parapet walls extending not more than four feet above the limiting height of the building;

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

Application for Certification For the *CHULA VISTA ENERGY UPGRADE PROJECT*

Docket No. 07-AFC-4

PROOF OF SERVICE
(Revised: 11/19/08)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-15
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT

Harry Scarborough
Sr. Vice President
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hscarborough@mmcenergy.com

APPLICANTS CONSULTANT

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APPLICANTS ENGINEER

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COUNSEL FOR APPLICANT

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jluckhardt@downeybrand.com

INTERESTED AGENCIES

California ISO
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Folsom, CA 95763-9014
e-recipient@caiso.com

INTERVENORS

California Unions for Reliable Energy (CURE)
c/o Marc D. Joseph
Gloria Smith
Suma Peesapati
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
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mdjoseph@adamsbroadwell.com
gsmith@adamsbroadwell.com
speesapati@adamsbroadwell.com

***City of Chula Vista, California**
c/o Michael Meacham
Director of Conservation &
Environmental Sevices
276 Fourth Avenue
Chula Vista, CA 91910
mmeacham@ci.chula-vista.ca.us

***City of Chula Vista, California**
c/o Michael J. Shirey
Deputy City Attorney
Chula Vista City Attorney's Office
276 Fourth Avenue
Chula Vista, CA 91910
mshirey@ci.chula-vista.ca.us

Environmental Health Coalition
Diane Takvorian & Leo Miras
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National City, CA 91950
DianeT@environmentalhealth.org
LeoM@environmentalhealth.org

ENERGY COMMISSION

Jackalyne Pfannenstiel
Chairman and Presiding Member
jpfannen@energy.state.ca.us

James D. Boyd
Vice Chair and Associate Member
jboyd@energy.state.ca.us

Raoul Renaud
Hearing Officer
rrenaud@energy.state.ca.us

Christopher Meyer
Project Manager
cmeyer@energy.state.ca.us

Kevin Bell
Staff Counsel
kwbell@energy.state.ca.us

Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Candy Uvero, declare that on November 19, 2008 I deposited copies of the attached REPLY BRIEFING STATEMENT OF THE CITY OF CHULA VISTA, Docket No.07-AFC-4, in the United States mail at Chula Vista with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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

Candy Uvero

Candy Uvero

Attachments