

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:) Docket No. 02-AFC-4
)
Application for Certification for the Walnut Energy)
Center)

APPLICANT'S OPENING BRIEF

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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:) Docket No. 01-AFC-17
)
Application for Certification for the Inland Empire)
Energy Center)

APPLICANT’S OPENING BRIEF

I. INTRODUCTION

Pursuant to the Committee’s direction at the close of Evidentiary Hearings on October 9, 2003, Turlock Irrigation District (“Applicant”) hereby files the following Opening Brief for the Walnut Energy Center (“WEC”) Application for Certification (“AFC”). The Staff of the California Energy Commission (“Commission”) has proposed Conditions of Certification for the WEC. The Applicant and Staff are in agreement regarding all but four of these Conditions.

First, in the area of Air Quality, the Staff and Applicant disagree concerning Condition AQ-C6, wherein the Staff has proposed a new “Best Available Control Technology” requirement for ammonia slip of 5 ppm, in the absence of any demonstrated need for such a requirement and in contradiction to the judgment of the San Joaquin Valley Unified Air Pollution Control District (“SJVUAPCD” or “District”). As we describe in Section II.E of our Brief below, the Applicant has proposed that the Committee rely upon the judgment of the agency charged with protecting air quality in the San Joaquin Valley, rather than on unsupported and ill-conceived claims by the Commission Staff (“Staff”).

The second area of disagreement concerns Condition AQ-SC8. In this condition, the Staff raises once again an issue that has been laid to rest in another Commission proceeding, relating to the acceptability of emission reduction credits issued by the SJVUAPCD. As shown in Section II.F of this Brief, this condition is unnecessary and impractical. In response to the Committee's directive at the October 9th hearing, Applicant has proposed alternative language to address this issue, which is also found in Section II.F.

The third issue relates to Condition Land-6 wherein the Staff recommends that the Project Owner be required to (1) pay a "mitigation fee" to a specified agricultural land trust or (2) acquire an agricultural easement for other farmland in the "vicinity". As we explain in Section III.B of this Brief, the Staff's proposed mitigation is contrary to law and is not supported by the record. The WEC will not have a significant adverse impact on agricultural resources. Moreover, because the conversion of farmland to industrial uses at the WEC site has twice been subject to full environmental review by the City of Turlock, CEQA mandates that the WEC shall not require further environmental review in this proceeding with respect to agricultural resources.

The fourth issue in contention involves Condition COM-8. Both the Staff and Applicant agree that the Applicant should develop, implement and maintain a site-specific Security Plan for the construction and operation phases of the project. While the Staff recommends that the Plans be maintained for review and approval by "Energy Commission personnel," the Applicant recommends that the Plans be maintained for review and comment by the Staff.

For all areas of general agreement with the Staff, we will file, under separate cover, suggested language for a proposed decision regarding these uncontested subject areas. With the Staff's consent, this document will be filed by November 4, 2003. For each of these subject

areas, our suggestions address (1) an introduction to the subject area, (2) a summary of the evidence, (3) proposed findings and conclusions, and (4) Conditions of Certification.

Except where otherwise noted, the introduction to each subject area is based upon the introductory language in other recently adopted Commission Decisions. The summary of the evidence and the proposed findings in each subject area are taken directly from the testimony of the Applicant and the Staff. The Conditions of Certification are taken directly from the Final Staff Assessment and subsequent errata of language to which the Applicant and Staff have stipulated.

II. AIR QUALITY

A. The WEC Will Comply with the Applicable Federal, State, and Local Laws, Ordinances, Regulations, and Standards, and with Mitigation, Does Not Result in Any Significant Air Quality Impacts.

Substantial evidence in this record demonstrates that the Walnut Energy Center is safe, and will meet all applicable air quality standards. This is true under all operating conditions, under all meteorological conditions and at all locations, based on conservative assumptions regarding background or existing air quality, operating levels, emission rates and meteorology. (9/29 RT 51). In addition, the record supports the conclusion that there are no significant, unmitigated air quality impacts associated with the Walnut Energy Center if the conditions proposed by the Applicant are adopted. (9/29 RT 53).

B. The WEC Will Have No Significant Impacts to Local Air Quality.

With respect to local air quality effects, the Walnut Energy Center project addressed those issues with three different types of analyses: (1) pollution control technologies, (2) air quality impacts analysis, and (3) preparation of a health risk assessment. (9/29 RT 50).

1. WEC Will Meet or Exceed the SJVUAPCD's BACT Requirements.

To address local air quality impacts, the WEC analyzed the appropriate pollution control technology and the "best available control technology" ("BACT"). (Ex. 1, pp. 8.1-58 to 8.1-60; Ex. 1, Appendix 8.1E; 9/29 RT 50). BACT is the fundamental cornerstone of any licensing process, requiring that new facilities use the cleanest technologies available. By ensuring that projects use the cleanest technologies, potential impacts on local air quality are minimized. (*Id.*).

In this case, the SJVUAPCD's Final Determination of Compliance ("FDOC") dated July 8, 2003 (Ex. 40), as amended on August 19, 2003, confirms that the WEC complies with BACT. (Ex. 41, p. 25). The Staff, in the Final Staff Assessment, concurred in this conclusion. (Ex. 11, p. 4.1-55).

With respect to carbon monoxide ("CO"), the WEC will comply with this BACT requirement through the use of dry low-NO_x combustors that minimize incomplete combustion, and an oxidation catalyst. (Ex. 1, p. 8.1-59). The SJVUAPCD has determined that BACT for CO is an emission limit of 4.0 ppmvd @ 15% O₂, averaged over three hours. (Ex. 41, p. 25). In simplest terms, the CO requirements in the permit are so stringent that the carbon monoxide concentrations inside the stack will be at or below the ambient air quality standard for carbon monoxide that is the level that is safe to breathe in ambient air.

Nitrogen oxides ("NO_x") will be controlled as well through a combination of two technologies. One is the use of dry low-NO_x combustors. The second is a system called selective catalytic reduction ("SCR"), a system that the Commission has reviewed many times before and found to be safe and effective. Each combustion gas turbine/heat recovery steam generator ("HRSG") train is designed to meet a NO_x emission concentration limit of 2.0 ppmvd NO_x @ 15% O₂, averaged over 1 hour, during all operating modes except gas turbine start-ups and

shutdowns and brief periods of excursions. (Ex. 1, p. 8.1-59; Ex. 41, Attachment A, p. A-5, Condition 27). This meets the current District BACT determination. (Ex. 41, p. 25).

Reactive organic gases (“ROGs”) will also be controlled through the use of dry low-NO_x combustors (Ex. 1, p. 8.1-59). The SJVUAPCD has determined that BACT for ROG is an emission limit of 2.0 ppmvd @ 15% O₂, averaged over three hours. (Ex. 41, p. 25).

Emissions of sulfur dioxide (“SO₂”) and particulate matter (“PM₁₀”) will be controlled through the use of natural gas as a fuel. WEC will use exclusively PUC-regulated natural gas, which satisfies the BACT requirement for SO₂. (Ex. 41, p. 25). Similarly, PM₁₀ emissions will be controlled through the use of clean burning natural gas for the combustion turbines, which will result in minimal PM₁₀ emissions and minimal formation of secondary PM₁₀. (Ex. 41, p. 25).

2. WEC’s Air Quality Impact Analysis Confirms That There Will Be No Significant Local Air Quality Effects.

The WEC has performed a thorough air quality impact analysis using dispersion models required by the United States Environmental Protection Agency (“USEPA”) and the SJVUAPCD and a number of worst-case assumptions. (Ex. 1, pp. 8.1-41 to 8.1-53; 9/29 RT 50-51). Specifically, the analysis assumes worst-case operating scenarios, worst-case emissions, and worst-case weather conditions at the project site. (9/29 RT 51). The analysis makes these combined worst-case assumptions even if those conditions physically cannot occur at the same time.¹ (*ibid.*).

¹ For example, the worst-case of emissions from a power plant might occur during winter conditions when the ambient temperatures are lowest and the mass flow through the engines are highest. The worst-case meteorological conditions for dispersion might occur in the summer. The air quality impacts analysis nonetheless assumes that those worst-case emissions aspects of the wintertime apply during the summer meteorological conditions, even though that is not physically possible.

The air quality impact analysis shows the location and levels of the greatest air quality impact. By definition, all other locations would have lesser levels of air quality impacts.

The purpose of all of these conservative assumptions is to make sure that the WEC project will not cause any violations of any state or air quality standards at *any* location at *any* time under *any* weather conditions and under *any* operating conditions. (9/29 RT 51). The air quality impacts analysis confirms that this is the case for the WEC. (*Id.*; Ex. 1, pp. 8.1-52 to 8.1-53).

3. The Health Risk Assessment Performed for the WEC Confirms that there are No Adverse Local Air Quality Impacts.

The WEC Health Risk Assessment (“HRA”) confirms that there will be no significant adverse local air quality impacts associated with the WEC. (9/29 RT 51). The results of the HRA show that the health risk is not significant at any location, at any time, under any operating conditions. The public health impacts associated with the project are not in dispute with Staff.

C. The WEC Will Have No Significant Impacts on Regional Air Quality.

The WEC will have no significant impacts on regional air quality. This finding of no significant impact is confirmed by the three components to the regional air quality studies performed by the WEC: (1) the use of best available control technology; (2) cumulative impacts analyses regarding regional air quality; and (3) emission offset requirements.

Each of these three regional impact analyses is considered in turn below.

1. The WEC Will Use Best Available Control Technology to Minimize Regional Air Quality Impacts

As discussed above, the WEC will use best available control technology to minimize project emissions. Minimizing project emissions is one of the most effective techniques for minimizing regional air quality impacts. (9/29 RT 50).

2. The WEC Will Not Cause Any Significant Unmitigated Cumulative Air Quality Impacts.

There have been several cumulative air quality impacts analyses for the WEC that looked at the impacts of the WEC and other reasonably foreseeable projects against the backdrop of existing background air quality levels. (9/29 RT 52). As with the local air quality analysis, WEC used multiple conservative assumptions in its cumulative air quality impact analyses. The first such analysis was included in the AFC. (Ex. 1, pp. 8.1-52 to 8.1-53). For example, in this analysis, if the highest PM₁₀ levels currently in this region occurred in the wintertime, and if the highest project impacts for PM₁₀ were to occur in the summertime, the analysis would nonetheless assume that they occurred at the same time. Even with this level of conservatism, the WEC will not cause any new violations of any state or federal air quality standards. (9/29 RT 52; Ex. 1, p. 8.1-52).

This analysis did show, not surprisingly, that the WEC would contribute to existing violations of the state and federal ozone standards, and of the state PM₁₀ standard, that occur during some times in the region. (*Id.*). Because of this contribution to those existing problems, air quality regulations require that WEC provide the second element of the regional air quality analysis, emissions offsets, as discussed in the next section below. It is important to note that, with respect to PM₁₀, the SJVUAPCD affirmatively concluded that the project would not result in any significant air quality impacts. (Ex. 41, Attachment H, p. 4).

A protocol for a second cumulative air quality impact analysis was included in the Application for Certification. (Ex. 1, Appendix 8.1G). The analysis demonstrated that the cumulative impacts of the proposed project and other new/modified sources in the project area are not expected to cause a new violation or contribute significantly to an existing violation of

any state or federal air quality standard in the project area. (Ex. 8, pp. 5-6; Ex. 11, pp. 4.1-53 to 4.1-54).

Thus, there have been two cumulative air quality impact analyses prepared for the WEC and both of these analyses reached the same conclusion: the WEC will not cause any new violations of state or federal ambient air quality standards but will contribute to existing violations of the state and federal standards for ozone and PM₁₀. (9/29 RT 52). These potential cumulative, regional air quality impacts are addressed through the provision of emission reduction credits. (9/29 RT 52-53). This mitigation measure is discussed further below.

3. The WEC has Identified and Will Obtain Emission Offsets to Fully Mitigate Any Potential Regional Air Quality Impact.

Emission offsets are part of a regional mitigation program designed to ensure that new plants of any type can be constructed while still making sure that progress towards cleaner air is maintained. Emission offsets are a requirement of local regulations, state law and federal law. (Ex. 1, pp. 8.1-60 to 8.1-62; Ex. 11, pp. 4.1-3 to 4.1-5).

WEC will provide offsets for this project as required by the SJVUAPCD. Specifically, WEC will provide offsets for all criteria pollutants in the quantities required by applicable law and regulation. (9/29 RT 53; Ex. 41, pp. 25-30; Ex. 11, p. 4.1-53). There is no dispute that WEC has satisfied the emission offset requirements of the SJVUAPCD:

“Staff has determined that the applicant’s offset proposal meets both District requirements and CEQA mitigation requirements.” (Ex. 11, p. 4.1-53)

D. Most Issues of Disagreement Between Applicant and Staff Have Been Resolved.

As a result of discussions between Applicant and Staff during workshops and at the Committee’s September 29 hearing, most areas of disagreement between Applicant and Staff in

the area of air quality have been resolved. The proposed Conditions of Certification for air quality contained in Staff's FSA Addendum (Ex. 47) are acceptable to Applicant with the exceptions noted below.

1. Issues Related to Construction Mitigation

a) Resolved Construction Mitigation Issues

Agreements have been reached between Applicant and Staff regarding proposed Conditions of Certification AQ-C1 through AQ-C4. As discussed in Applicant's direct testimony, although Applicant believes that the Staff requirements in this area are duplicative of SJVUAPCD requirements, Applicant agrees to proposed Conditions of Certification AQ-C1 through AQ-C4. (9/29 RT 54-56).

b) Unresolved Construction Mitigation Issues

There are no unresolved construction mitigation issues related to air quality.

2. Issues Related to Operation Mitigation

a) Resolved Project Operation Issues

Applicant and Staff agree on proposed Conditions of Certification AQ-C5 and AQ-C7, as well as on AQ-1 through AQ-111, as presented in the Staff's FSA Addendum. (Ex. 47). This agreement was completed at the September 29th hearing with proposed language for the verification section of AQ-47, which is restated below for the convenience of the Committee.

Verification: The project owner shall provide a source test plan demonstrating compliance with this condition to the CPM for review and APCO for approval fifteen (15) days prior to testing. Front-half (non-condensable) and back-half (condensable) particulate shall be measured and reported. In addition, the project owner shall provide to the CPM evidence of the District's approval of the source test plan prior to conducting the source test. (9/29 RT 57-58).

b) Unresolved Project Operation Issues

There are two unresolved issues related to project operation – proposed Condition AQ-C6 (related to ammonia slip), and proposed condition AQ-C8 (related to the acceptability of certain emission reduction credits). Each of these issues is discussed in more detail below.

E. Proposed Condition AQ-C6 Relating to Ammonia Slip Should be Deleted.

The Staff has proposed Condition AQ-C6 to require a 5 ppm ammonia slip limit (Ex. 11, pp. 4.1-53, p.1-62); the FDOC issued by the SJVUAPCD established a 10 ppm ammonia slip limit (Ex. 41, Attachment A, p. A-5, Condition 37). The SJVUAPCD has reviewed this issue, and has concluded that a 10 ppm ammonia slip limit is appropriate for this project. (Ex. 41, p. 8; Ex. 39, p. 9; 9/29 RT 36; 9/29 RT 118-119). It is undisputed that there is no BACT requirement for ammonia emissions (9/29 RT 64; SJVUAPCD Rule 2201, Section 3.4 (defining “affected air pollutant”)); yet this is precisely what the Staff is attempting to establish. (9/29 RT 98).

Mr. Walters: I believe that our current idea on how we’re going to deal with ammonia is yes, that we are going to try to propose 5 ppm ammonia on all class 7 type projects. (9/29 RT 129)

WEC’s air quality witness provided testimony indicating that further control of ammonia emissions, below the 10 ppm level required by the SJVUAPCD, will not result in any health benefits. (Ex. 45, pp. 7-8; 9/29 RT 67). The Staff’s conclusions regarding the need for a 5 ppm ammonia slip limit are completely at odds with the Staff’s position in a number of other cases, including the High Desert (97-AFC-1), Sutter (97-AFC-2), Los Medanos (98-AFC-1), La Paloma (98-AFC-2), Delta (98-AFC-3), Sunrise II (98-AFC-4C), Elk Hills (99-AFC-1), Otay Mesa (99-AFC-5), Pastoria (99-AFC-7), Blythe (99-AFC-8), Midway Sunset (99-AFC-9), Valero (01-AFC-5), Los Esteros (01-AFC-12), MID Woodland II (01-SPPE-1), and Tracy Peaker (01-AFC-16) Projects. (Ex. 45, p. 9). These projects cover a broad range in time, a broad range in

size and combustion technology, and a range of attainment designations. Despite protestations to the contrary, in fact the Staff has presented no evidence in the WEC proceedings to support a different conclusion in this case, or for second-guessing the judgment of the air pollution control agencies with principal responsibility for air quality in this region.

During the September 29th hearing, evidence was presented that an analysis by the California Air Resources Board contained in the San Joaquin Valley APCD's PM₁₀ air quality plan demonstrated that the San Joaquin Valley Air Basin was unlikely to benefit from additional ammonia emission controls. (Ex. 45, p. 8; 9/29 RT 65-66) This conclusion was reiterated by the SJVUAPCD staff.

Mr. Swaney: We feel that controlling the NO_x emissions is more important than any secondary particulate that may be formed from 10 ppm ammonia versus 5 ppm.

Ms. Holmes: Is it your -- when you say that it's more important to control the NO_x emissions are you suggesting that the NO_x emissions would be higher if the ammonia slip level were 5 ppm?

Mr. Swaney: No, we are not. What we are saying is that we want to insure that the NO_x limits are met without being unduly prescriptive on other issues where we don't feel that there is that much of an issue. (9/29 RT 41-42)

This conclusion means that increases or decreases in ammonia emissions in the San Joaquin Valley Air Basin are not likely to result in any changes to ambient PM₁₀ levels. (9/29 RT 67), This assessment is a case-by-case determination, based on local air quality data and meteorology, and the conclusion does not hold true for all parts of California. The correctness of the conclusion for the San Joaquin Valley has not been challenged by any air pollution control agency. In fact, the Preliminary Determination of Compliance ("PDOC") for the WEC was circulated to the California Air Resources Board, U.S. Environmental Protection Agency, and the Staff, as well as to the public. The California Air Resources Board did not file written comments regarding the PDOC, and US EPA's comment letter (Ex. 36) did not question the 10 ppm ammonia slip level proposed by the SJVUAPCD. Only the Staff's comment letter raised this

issue. (Ex. 37, pp. 4-5). The SJVUAPCD responded to the Staff's comments on this point in issuing the FDOC, rejecting a proposed reduction in the ammonia slip limit: "The District disagrees that 5 ppm or less should be the ammonia slip level. Instead, the ammonia/NOx relationship must be carefully reviewed for any individual proposal." (Ex. 39, p. 9). The Staff's position regarding ammonia slip for all large, combined-cycle gas turbines is directly at odds with the SJVUAPCD's reasoned approach.

In two recent cases, the Commission's Decisions for the East Altamont Energy Center and the Cosumnes Power Project rejected the Staff's arguments that a 5 ppm slip level should be required, and sustained the opinions of the Applicant, Bay Area AQMD and San Joaquin Valley APCD (Commission Decision, East Altamont Energy Center, 01-AFC-04, pp. 142-143; PMPD, Commission Decision, Cosumnes Power Project, 01-ACF-19, p. 18). In each of these cases, the Staff argued that a more stringent ammonia slip level of 5 ppm was necessary because those projects would affect PM₁₀ air quality in the San Joaquin Valley Air Basin (EAEC) or Sacramento Area (CPP). In fact, the Staff's arguments in the EAEC and CPP cases are nearly identical to those presented in this preceding.

However, the Staff's position in all three cases – EAEC, CPP and WEC - is diametrically opposed to that taken by the Staff in the San Joaquin Valley Energy Center proceeding in which they stated the following:

"The ammonia emissions from the project would come from the SCR system, which controls the NOx emissions, as unreacted ammonia, or "ammonia slip," that remains in the exhaust after passing through the SCR catalyst system. The San Joaquin Valley, as a result of agricultural ammonia emissions, is ammonia rich, meaning that ammonia is not the limiting reactant for secondary PM10 formation. This means higher ammonia emissions will not necessarily result in additional secondary PM10 formation; however, reducing NOx emissions will almost certainly reduce secondary PM10 formation. While the ammonia emissions are recognized as a necessary by-product of the NOx control system, staff still encourages the Applicant to control their ammonia slip emissions to the

lowest possible extent, while maintaining the guaranteed NOx emission limit.” (San Joaquin Valley Energy Center, 01-AFC-22, Staff Assessment, p. 4.1-43)

The Staff recommended an ammonia slip limit of 10 ppm in the SJVEC case.²

In response to direct questions from WEC’s counsel during the September 29th hearing, the Staff clearly indicated that they were now attempting to use a “one size fits all” approach to ammonia slip levels.

Mr. Walters: I believe that our current idea on how we’re going to deal with ammonia is yes, that we are going to try to propose 5 ppm ammonia on all class 7 type projects. (9/29 RT 129)

However, there is no logical pattern to the Staff’s advocacy of a 5 ppm slip level, except that they appear to be advocating such a position with somewhat greater frequency more recently. It is precisely this lack of rationality which imparts a need for the Committee to defer to the SJVUAPCD’s judgment on this issue.

In the CPP proceeding, the Staff took the position that even if the Sacramento region is ammonia rich, and even though the area was not violating the federal PM₁₀ air quality standards, further control of ammonia slip would be beneficial (CPP 3/13 RT 146-147). The Commission’s decision in the CPP case reflects the judgment that this opinion is not determinative:

“By some past siting decisions, the Commission has determined that 5 ppm ammonia slip is appropriate to not add to the potential for particulate formation. What becomes less clear scientifically is the significance of the contribution to particulate formation of 10 ppm ammonia slip in an already ammonia rich setting. Under such circumstances and mindful of CEQA’s requirement for a substantial or potentially substantial impact, the mere technical feasibility of lowering ammonia slip to 5 ppm does not require its imposition.

“In other past siting decisions, the Commission finds that in already ammonia rich setting, such as the Cosumnes Project, an ammonia slip limit of 10 ppm is appropriate. The Commission also notes that in actual use the SCR catalyst will initially produce far less ammonia slip, on the order of 1-2 ppm. Over a few years time, the efficiency of the

² The Staff’s testimony in the WEC proceeding that the Staff extended an “olive branch” to SJVEC is simply untrue. The Staff’s testimony on the ammonia slip issue in the SJVEC proceeding is nearly verbatim to Staff’s testimony on the same issue in a number of prior proceedings. Perhaps the Staff is arguing that they extended the same “olive branch” to La Paloma, Elk Hills, and Midway Sunset, among others.

catalyst degrades to a maximum of 10 ppm, leading to its replacement and a repetition of this cycle of catalyst efficiency. Moreover, the project is designed so that if District rules later require a lower ammonia slip, the project can accommodate that requirement. The Commission is satisfied that this level is sufficient to protect public health.” (CPP Decision, 01-AFC-19, p. 18)

The same rationale and conclusion apply in the WEC proceeding as well.

In the WEC proceeding, the Staff has failed to develop evidence demonstrating that there is a significant air quality impact related to ammonia slip that warrants further mitigation. In addition, the Staff has failed to overcome the evidence which concludes that reducing ammonia slip levels from 10 ppm to 5 ppm would, in fact, provide little additional air quality or public health benefits.

The Committee should rely on the expertise of the regional air pollution control agency charged with protecting air quality in the San Joaquin Valley, and should reject the Staff’s attempts to establish a new BACT requirement without the benefit of the SJVUAPCD’s extensive experience in this area. The Committee should reject proposed Condition AQ-C6 in its entirety.

F. The Committee Should Delete Proposed Condition AQ-C8 Related to the Acceptability of Emission Reduction Credits.

In proposed Condition AQ-C8, the Staff proposes to establish a new requirement that WEC obtain an additional approval from the US EPA prior to using two specified emission reduction credits. (Ex. 11, p. 4.1-63). The Staff argues that this condition is necessary because EPA has questioned the acceptability of these credits. (Ex. 11, p. 4.1-46 to 4.1-47).

There are two flaws with the Staff’s logic in this area.

First, EPA did not even mention one of the two certificates listed in AQ-C8. Certificate C-492-4 is identified in AQ-C8, yet was not mentioned in EPA’s comment letter to the SJVUAPCD on the PDOC for WEC. (Ex. 36, p. 1). The Staff creates an issue surrounding this

certificate simply out of whole cloth, and then attributes their own concern to EPA to give it a sheen of respectability.

Second, even with respect to the second certificate listed in AQ-C8 (S-1834-2), EPA's comment to the SJVUAPCD was simply a reminder that certain EPA requirements must be satisfied before these credits can be used.

“As you know, EPA has informed the District in the Federal Register (68 FR 7330) and our April 21, 2003 comments on the District's draft PM10 plan that pre-baseline ERCs are not surplus if they are not correctly included in all of the relevant attainment plans.” (Ex. 36, p. 1)

In its response to EPA upon issuance of the FDOC, the SJVUAPCD indicated that it has, and will continue to follow, EPA requirements on this matter.

“The District maintains that the applicants [sic] proposed pre-baseline ERCs are surplus and have been properly accounted for as discussed in our comments dated March 13, 2003, regarding the EPA's proposed approval of the District's revised permit exemption and new source review (NSR) rules. As you know, the District is currently working with the EPA to draft acceptable language in the District's 2003 PM10 plan, which was adopted by our Governing Board on June 19, 2003. Therefore, the ERCs proposed by the applicant are valid and can be used to mitigate their proposed emissions.” (Ex. 40, p. 3).

WEC believes although WEC recognizes that there has been, and may continue to be, a dispute between the SJVUAPCD and EPA regarding the acceptability of certain ERC certificates.

Although Applicant believes that it has fully and completely satisfied the requirements of SJVUAPCD rules regarding the provision of emission reduction credits and that there is not an outstanding issue regarding either of these certificates, Applicant understands that the Commission is potentially in the difficult position where there may be an ongoing point of disagreement between two air quality regulatory agencies. To address this possibility, and to respond to the Committee's directive at the October 9th hearing, Applicant proposes the following language as an alternative to AQ-C8:

AQ-C8 The project owner shall not use ERC certificate S-1834-2 or C-492-4 to offset the project if EPA notifies the project owner or the District in writing that the use of these certificates for the Walnut Energy Center would result in a violation of federal regulations or statutes. In such case, the project owner shall submit an application to the District and the Commission seeking approval for the substitution of alternative ERCs.

Verification: The project owner shall submit to the CPM, within ten days receipt, any communication from EPA or the District indicating that ERC certificate S-1834-2 or C-492-4 may not be used for this project. In the event the use of these ERCs is disapproved by EPA, within 90 days of receipt of notification of such disapproval, the project owner shall file with the District and with the CPM applications to amend the District permit and Commission decision, respectively, to substitute alternative ERCs.

This language is responsive to the Committee's request for assistance in ensuring that the WEC does not proceed with ERC certificates found by EPA to be invalid, without interjecting the Commission (or Staff) into what is ultimately an issue for the SJVUAPCD and EPA to resolve.

III. LAND USE

The Commission's land use analysis focuses on two main issues: (1) whether the project is consistent with local land use plans, ordinances, and policies; and (2) whether the project is compatible with existing and planned land uses.

As discussed in Section III.A of this Brief, below, there is no dispute that the WEC is consistent with local land use plans, ordinances and policies. It is uncontroverted that the WEC is compatible with existing and planned land uses. Moreover, if the WEC were subject to local permit jurisdiction, the City of Turlock would not require the payment of farmland mitigation fees or the acquisition of agricultural easements.

Despite the fact the project complies fully with all applicable land use LORS, the Staff has proposed that additional mitigation be imposed. The Staff concludes that the project will

have a significant adverse impact on agricultural resources and recommends that the Project Owner be required to (1) pay a “mitigation fee” to a specified agricultural land trust, or (2) acquire an agricultural easement for other farmland in the “vicinity”.

As we explain in Section III.B of this Brief, the Staff’s proposed mitigation is contrary to law and is not supported by the record. The WEC will not have a significant adverse impact on agricultural resources. Moreover, because the conversion of farmland to industrial uses at the WEC site has twice been subject to full environmental review by the City of Turlock, CEQA mandates that the WEC shall not require further environmental review in this proceeding with respect to agricultural resources.

A. The WEC Is Consistent With All Applicable Land Use Plans, Policies and Regulations.

The undisputed evidence in this proceeding is that the WEC is consistent with all applicable land use plans, policies and regulations. (Ex. 45, pp. 67-68; Ex. 11, p. 4.5-9)

The 18 acre WEC site is designated in the City General Plan for industrial land uses. The Industrial General Plan Designation includes large and small-scale industrial, manufacturing, distributing and heavy commercial uses. Although the General Plan designation does not specifically site thermal power plants as an allowable use, the authority for use of the site for the proposed power plant is found in the applicable zoning article. (Ex. 45, p. 67)

The WEC plant and its site are consistent with the type and density of Land Use development established by existing zoning and General Plan policies of the City of Turlock for which an EIR was certified by the City of Turlock. The WEC site is in the industrial (I) zoning district. According to the City, the specific purposes of the industrial zoning district are to:

- Provide appropriately located areas consistent with the General Plan for a broad range of manufacturing and service uses

- Strengthen the City’s economic base and provide employment opportunities close to home for residents of the city and surrounding communities
- Minimize the impact of industrial uses on adjacent residential and commercial districts.

The additional purpose of the industrial (I) zoning district is to “provide for a full range of manufacturing, industrial processing, general service, and distribution uses deemed suitable for location in Turlock; and to protect Turlock’s general industrial areas from competition for space from unrelated uses that could more appropriately be located elsewhere in the city”.

According to the City, the WEC would be classified as a “major utility” consistent with Section 9-3-402 of the City Zoning Ordinance. (Ex. 45, pp. 67-68).

B. The WEC Will Not Cause a Significant Adverse Impact on Farmland.

1. The Use of 18 Acres of Farmland at the WEC Site Represents an Insignificant Impact to Agricultural Resources.

The Staff notes that the environmental checklist contained in Appendix G to the CEQA Guidelines provides that a project *may* cause a significant adverse impact to agricultural resources *if* it converts prime farmland to non-agricultural use. The Staff states that 18 acres at the WEC site are designated as “Prime Farmland” by the California Department of Conservation. Therefore, ipso facto, and without any further analysis or discussion, the Staff has “concluded” that WEC *will* create significant adverse environmental impacts on agricultural resources. (Ex. 11, pp. 4.5-9 – 4.5-10). A significant impact is defined as a “substantial” adverse change on the physical conditions within the area. (14 Cal. Code of Regs., §15383) Yet, Staff has offered not one shred of evidence to explain, much less prove, why the WEC would constitute a “substantial” adverse change on agricultural resources.

In contrast to the Staff's unsupported conclusion, the Applicant has introduced substantial evidence regarding the specific impacts of the WEC on agricultural resources. (Ex. 45, pp. 64-72.) The Applicant's testimony explains clearly why the use of the WEC site does not represent a substantial change to farmland. Construction of WEC would result in the use of approximately 18 acres of prime farmland, or less than 0.000064 (0.0064 percent) of important farmland within Stanislaus County. (Ex. 45, p.70) The conversion of the agricultural land to industrial use at the WEC site was authorized by the City of Turlock after evaluation in the City's 1992 General Plan Update environmental document. (*Id.*) And even if the WEC is not built, the City's prior approval of the conversion of this site from agricultural to industrial zoning will result in a similar loss of farmland, without a requirement that such loss be mitigated. Based on these facts, the Applicant respectfully submits that the Committee should find that WEC will not create a significant adverse impact on agricultural resources.

2. The Commission has found the conversion of 20 acres of farmland to be insignificant.

In the case of the Metcalf Energy Center, 99-AFC-3, ("MEC") the Commission was faced with a very similar question regarding the MEC's potential impact on agricultural resources. In the Metcalf case, the 20-acre "MEC site is designated Prime Farmland on the Department of Conservation's 1998 Important Farmland Map for Santa Clara County." (MEC Final Decision, p. 318) Staff asserted that development of the *20-acre* MEC site would constitute conversion of prime farmland and create a significant adverse impact to agriculture. (*Id.*) The Applicant acknowledged that the MEC would make industrial use of 20 acres of land currently used for agriculture. However, the Applicant contended the conversion of prime farmland in the site vicinity is not a new impact because it was contemplated in the City's redesignation of the entire North Coyote Valley area from agricultural to Campus Industrial in

the 1985 North Coyote Master Development Plan. The Applicant argued that the environmental impacts associated with the City's adoption of the Campus Industrial land use designation were considered by the City in the environmental document accompanying that action. The Applicant further asserted that the entire 20-acre site is a small percentage of the acreage designated as prime farmland in the County and is, therefore not significant. (*Id.*)

The Commission's Final Decision agreed with the Applicant:

"We agree with Applicant. The City's General Plan redesignating the North Coyote Valley area as Campus Industrial anticipated the unavoidable conversion of prime farmland as evidenced by the EIRs for the Master Development Plan and the CVRP/Cisco project. In our opinion, the small number of converted acres (20) due to the MEC would not constitute a significant environmental impact given the level and nature of projected development, as well as the parcel's Campus Industrial designation. Furthermore, Staff acknowledges that even if the MEC project is not built, development of the site for approved uses (such as campus industrial) would result in the loss of a similar amount of farmland. (Ex. 7, pp. 764-765.) Accordingly, we find that the conversion of the parcel for use by the MEC will not result in a significant adverse impact. (*Id.*)

The Commission's Metcalf Final Decision also contained language regarding the environmental checklist in Appendix G, which is particularly instructive to the instant case. In this case, as in the MEC proceeding, the Staff seems to conclude that any use of farmland *will* be significant merely because Appendix G states that the conversion of prime farmland *may* be significant. (9/29 RT 210-212)³ The Metcalf Final Decision expressly rejects this premise:

We note that Appendix G of the Guidelines contains a checklist which is to be used as part of an agency's initial study to assist it in making the determination of whether or not to prepare a full environmental analysis of a project. [14 Cal. Code of Regs., §15063 (d) (3), (f).] The mere fact that a specific item on the checklist is appropriate does not mean that such item necessarily equates with a significant impact. (MEC Final Decision, fn. 106, p. 321)

³ For example, during legal argument Staff asserted that the CEQA guidelines "simply refer to the conversion of prime ag land as being a significant adverse impact." (9/29 RT 210) Under questioning from the Hearing Officer, Staff later conceded that Appendix G states that an impact may be significant, not that it will be significant. (*Id.* at 211)

3. The Commission Should Find That the WEC Will Not Result in a Significant Adverse Impact on Farmland.

Mitigation measures must be consistent with all applicable constitutional requirements. (14 Cal. Code of Regs., §15126.4 (a)(4)) Fundamental principles of due process and equal protection require that similarly situated projects be treated similarly. Therefore, just as the Commission found that the 20-acre MEC project, given its industrial designation, would not result in a significant impact on farmland, the Commission should find here, based on similar facts, that the 18-acre WEC site, given its industrial designation, will not result in a significant adverse impact on farmland.

C. Under CEQA, The WEC Will Not Cause “Conversion” of Farmland.

1. CEQA requires environmental review of environmental impacts, such as the potential conversion, as early as possible in the planning process.

CEQA requires environmental review of the proposed conversion of farmland as early as feasible in the planning process. Before granting any approval of a project subject to CEQA, every Lead Agency must first consider the appropriate environmental documentation authorized by the CEQA Guidelines. (14 Cal. Code of Regs., §15004(a)) Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment. (14 Cal. Code of Regs., §15004(b)) As noted in the Discussion following this Code section “Early preparation is necessary for the legal validity of the process and for the usefulness of the documents. Early preparation enables agencies to make revisions in projects to reduce or avoid adverse environmental effects before the agency has become so committed to a particular approach that it can make changes only with difficulty.”

2. CEQA requires environmental review be coordinated with local planning processes.

CEQA guidelines further provide that “the environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively.” (14 Cal. Code of Regs., §15004(c))

3. In coordination with local planning processes, during the past ten years the City has completed two thorough and timely reviews of the conversion of the WEC site to industrial zoning.

Consistent with the above stated principles, the City of Turlock conducted a thorough environmental review of its 1993 General Plan Update, before approving a series of land use decisions that converted the WEC parcel from agricultural to industrial zoning.

The Applicant’s written testimony contains a complete narrative of the General Plan Update process and the accompanying environmental review. (Ex. 45, pp. 68-70) This evidence, which is undisputed, is that in 1993 “the City of Turlock prepared an update to the 1984 Turlock General Plan. This General Plan Update authorized the conversion of 4,700 acres (of which 3,200 acres were designated as prime farmland) from agricultural land to urban (non-agricultural) land uses. The WEC site is located within the area that was converted from agricultural to nonagricultural use by the General Plan Update.” (Ex. 45, p. 68)

Prior to adopting the General Plan Update (including those provisions of the General Plan which converted 4,700 acres from agricultural to non-agricultural uses) the City of Turlock prepared, pursuant to CEQA, a Notice of Preparation issued February 11, 1992, a Draft EIR and Master Environmental Assessment circulated for public review from October 1, 1992 to November 22, 1992, and a Final EIR issued for public review on December 28, 1992. (*Id.*)

The undisputed evidence is that the Draft and Final EIR, together with the Master Environment Assessment, contain a detailed discussion of the impacts of the proposed conversion of 4,700 acres of land from agricultural to urban use. (*Id.*)

In oral argument, the Staff characterizes “the analysis in the 1992 EIR of the impacts caused by the agricultural land conversion is perfunctory, at best.” (9/29 RT 200-201) Staff asserts that the only discussion of this issue in any of the City’s environmental documents is less than one page in the 1992 EIR and a single statement in Resolution 93042. (*Id.* at 201) While we find some irony in Staff’s complaint (one page of analysis on this issue is considerably more than the Staff offered in the FSA), the complaint is simply incorrect. The issue of farmland usage, impacts, cumulative impacts and mitigation is addressed at length in the Master Environmental Assessment and the Supplemental Master Environmental Assessment, both of which were incorporated by reference in the two EIRs. (Ex. 48, Master Environmental Assessment, Soils and Agricultural Resources, pp. 33-40; Ex. 48. DEIR. pp. S-4, 30-33, 46-54) In addition, it is not merely the Applicant’s expert testimony that the EIRs contain a thorough analysis of these issues. The City Council of the City of Turlock, has found as a matter of law, that “The findings of the City Council with respect to the General Plan Update, Final EIR and Statement of Overriding Considerations” were supported by substantial evidence in the record, including relevant public testimony received at approximately 14 public meetings and workshops between February 1991 and March 1993.” (Ex. 45, p. 69; quoting City of Turlock Resolution No. 93-042, Third Whereas Clause- Section 5 (March 15, 1993).

Therefore, the findings of the Turlock City Council, the undisputed expert testimony of the Applicant and the documents themselves demonstrate that the City of Turlock has performed

a thorough and detailed analysis of the impacts of converting 4,700 acres to urban use. Staff's perfunctory conclusion in the FSA should not override the City's environmental analysis.

In summary then, the impacts of converting the parcel on which WEC would be located from agricultural to industrial use were analyzed in:

- (1) The 1992 Master Environmental Assessment and Draft EIR,
 - (2) The 1992 Final EIR,
 - (3) The 1992 Statement of Overriding Considerations,
 - (4) The 2002 Review of the General Plan,
 - (5) The 2002 Revised Master Environmental Assessment, and
 - (5) The Negative Declaration and recertification of the 1992 Final EIR for the 2002 Review.
- (Ex. 45, pp. 69-70)

4. Given the extensive environmental review undertaken by the City of Turlock, CEQA mandates that the farmland impacts of WEC shall not require further environmental review.

The Commission's review of the farmland impacts of WEC is governed by Public Resources Code Section 21083.3, which provides in pertinent part:

21083.3. (a) If a parcel has been zoned to accommodate a particular density of development or has been designated in a community plan to accommodate a particular density of development and an environmental impact report was certified for that zoning or planning action, the application of this division to the approval of any subdivision map or other project that is consistent with the zoning or community plan shall be limited to effects upon the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report.

(b) If a development project is consistent with the general plan of a local agency and an environmental impact report was certified with respect to that general plan, the application of this division to the approval of that development project shall be limited to effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report.

To implement Public Resources Code Section 21083.3, the Resources Agency has promulgated Section 15183 of the CEQA guidelines, which provides in pertinent part:

15183. Projects Consistent with a Community Plan or Zoning

“(a) CEQA mandates that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site. This streamlines the review of such projects and reduces the need to prepare repetitive environmental studies.

“(b) In approving a project meeting the requirements of this section, a public agency shall limit its examination of environmental effects to those which the agency determines, in an initial study or other analysis:

- (1) Are peculiar to the project or the parcel on which the project would be located,
- (2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan, or community plan, with which the project is consistent,
- (3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action, or
- (4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.” (14 Cal. Code of Regs., §15183)

The WEC falls squarely within the provisions of Public Resources Code Section 21083.3 and Section 15183 of the CEQA guidelines. First, the WEC is a project that “is consistent with the development density established by existing zoning, community plan, or general plan policies....” (Ex. 45, p. 65; Ex. 11, p. 4.5-9)

Second, WEC is a project “for which an EIR was certified.” (Ex. 45, p. 65) In fact, it is a project for which an EIR has been certified not just once, but twice. (*Id.*)

Under these circumstances, Section 15183 states that in approving the WEC, or other project meeting the requirements of 15183, the Commission *shall* limit its examination of environmental effects to those which the agency determines, in an initial study or other analysis meet specific exceptions.

Before we turn to a discussion of these exceptions, it is important to note that the provisions of Section 15183 are mandatory and are expressly intended to streamline the review of projects such as WEC and to reduce the need to prepare repetitive environmental studies.” (14 Cal. Code of Regs., § 15183(a)) These mandatory provisions do not completely eliminate environmental review, but they do specifically circumscribe the Commission’s scope of review and permit the Commission to examine a limited list of exceptions. Once the Commission has examined these exceptions and has found that they are not applicable to the WEC, “*a statutory exemption applies as a matter of law.*” *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 377-383, 267 Cal.Rptr. 569, 787 P.2d 976 [holding that statutory exemption applied; reversing agency determination to the contrary] (emphasis added).

a) There are no effects which are peculiar to the WEC or the parcel on which the WEC would be located.

The undisputed evidence is that there are no project specific effects of the WEC on agricultural resources which are peculiar to the WEC or the site on which the WEC would be located. (Ex. 45, p. 71) The Staff chose not to analyze whether there are any project specific effects on farmland which are peculiar to WEC. (9/29 RT 218)

The sole impact cited by the Staff is the loss of farmland due to industrial use, the very impact which was thoroughly evaluated by the City in the prior environmental reviews. Any project that is consistent with the Industrial Zone will have this same effect. The site is just one site among literally thousands of acres in the City and tens of thousands of acres in Stanislaus

County. Therefore, the overwhelming and undisputed evidence of record is that there are no project specific effects on farmland that are peculiar to the WEC or the site.

b) There are no effects which were not analyzed as significant effects in a prior EIR on the zoning action, general plan, or community plan, with which the WEC is consistent.

No party identified any effects which were not analyzed as significant effects in a prior EIR on the zoning action or general plan, with which the WEC is consistent.

c) There are no potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action.

No party has identified any potential *off-site* impacts of the WEC on agricultural resources. Both prior EIRs considered the potential cumulative impacts on farmland resulting from industrial use of the rezoned parcels. No party has raised any potentially significant impacts which were not discussed in the prior EIRs.

d) There are no previously identified significant effects which, as a result of substantial new information that was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.

No party has identified any previously identified significant effects which, as a result of substantial new information that was not known at the time either of the previous EIRs were certified, are determined to have a more severe adverse impact than discussed in the prior EIR.

5. Staff's interpretation and application of the *Gentry* and *CBE* cases are incorrect.

Staff cites two cases in support of its argument that Public Resources Code Section 21083.3 is not applicable to this proceeding.

First, the Staff cites *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1399 [43 Cal.Rptr.2d 170] ("*Gentry*") for the proposition that applicability of Section 21083.3 is

“optional” and that “a lead agency must both affirmatively elect to use this provision and provide notice of its intent to use this provision before it can do so.” (9/29 RT 199) The Staff argues that “The same is true here. The Energy Commission has not chosen to curtail its assessment of this project based on the prior EIR, nor did it at anytime identify the prior EIR as a relevant document in any public notice or request for comments. As a result we should not now be relying on it as justification for not addressing the conversion of prime farmland.” (*Id.*)

In *Gentry*, the Court did not rule that the applicability of Section 21083.3 is “optional”. That term is never used in the decision. In fact, the Court ruled just the opposite. The Court held that “In an appropriate case, undisputed facts in the record might demonstrate that *a statutory exemption applies as a matter of law.* (See *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 377-383, 267 Cal.Rptr. 569, 787 P.2d 976 [holding that statutory exemption applied; reversing agency determination to the contrary] (emphasis added). (*Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at p. 1407.)

Nor is the instant case the “same” as *Gentry*. In *Gentry*, the Court found that there was no “reference to section 21083.3 in the administrative record, and our review of the record has not revealed any. The record likewise does not reflect that the County or the City made any effort to determine whether any environmental effects of the Project were “peculiar,” and if so, whether they were addressed in the Plan EIR.....When respondents’ counsel appeared at public hearings to defend the Project’s compliance with CEQA, he did not claim that section 21083.3 applied, but rather that all of the Project’s potential environmental effects had been appropriately mitigated.....the environmental review process failed to develop the pertinent facts because the agency was operating under an incorrect legal standard.” (*Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at p. 1407.) Thus, *Gentry* stands for the simple proposition that if the Lead Agency

“never purported to apply section 21083.3 and instead subjected the Project to plenary environmental review” a Court “lack[s] an adequate record from which to determine, in hindsight, whether section 21083.3 applied.” (*Id.*)

In the instant case, however, the administrative record is replete with references to section 21083.3. When TID’s counsel appeared at public hearings, he did claim that section 21083.3 applied to this case. (9/29 RT 218-220) Most importantly, the record of this proceeding contains all of the pertinent facts necessary to determine whether section 21083.3 applies to the WEC. This information is contained in the AFC, Applicant’s Response to Staff Data Requests and the Applicant’s written testimony.

The Staff argues that “The Energy Commission has not chosen to curtail its assessment of this project based on the prior EIR”. (9/29 RT 200) While it is true that the Staff has apparently chosen to disregard Section 21083.3, the Staff is not the Commission. The Staff is an independent party in this proceeding. The Staff is not the decision maker. The scope of the Commission’s assessment of the WEC’s impact on agricultural resources is a question of law, not a matter of choice and certainly not the choice of a single party.

The Staff also argues that the Commission did not at any time identify the prior EIR as a relevant document in any public notice or request for comments.” (9/29 RT 200) Yet, *Gentry* contains no such requirement. Moreover, contrary to Staff’s assertion, the prior EIR was clearly identified in the initial Application For Certification, together with the specific facts relevant to Section 21083.3:

The project would permanently remove up to 18 acres of prime farmland from production; however, the project is consistent with current industrial land use and zoning designations. Conversion of farmland to industrial uses as a result of planned growth, including the proposed site for the project, has been considered by the City as a result of adoption of its 1992 General Plan Update, and approved through a statement of overriding considerations. The City found that conversion of wildland uses, as well as

annexation of existing agricultural lands on the east side of the City, would mitigate the loss of agricultural uses converted to future industrial use (City of Turlock 1992). (Ex. 1, p. 8.4-13)

The two prior EIRs were also expressly reference at the second prehearing conference (8/25/03 RT 95), in the Applicant's written testimony (Ex. 45, pp. 68-70) and during the evidentiary hearings. Thus, all parties have had timely notice and a full opportunity to address the relevance and adequacy of these documents from the very commencement of this proceeding.

The second case cited by Staff is *Communities for a Better Environment v. California Resources Agency*, 103 Cal.App.4th 98, 126 Cal.Rptr.2d 441. This case, however, does not even address Public Resources Code Section 21083.3 or Section 15183 of the CEQA Guidelines. Instead, this case addresses CEQA guidelines applicable to tiering. As the *Gentry* case points out, while the *results* of section 21083.3 are much like those of tiering, "Nevertheless, section 21083.3 is not, strictly speaking, a tiering provision; rather, it provides a statutory exemption from CEQA. (1 Kostka & Zischke, s 11.34, pp. 452-453; see former s 21083.3, subd. (a), amended eff. Jan. 1, 1993, now s 21083.3, subd. (e).)" Therefore, Staff is incorrect in simply characterizing section 21083.3 as "another tiering provision" and is incorrect in applying a decision interpreting tiering guidelines to the application of Public Resources Code Section 21083.3.

D. The Commission should find, in the alternative, that the impacts of the WEC on farmland are either insignificant or exempt from further environmental review.

"In the 19 years since CEQA was enacted the Legislature has, for reasons of policy, expressly exempted several categories of projects from environmental review." (*Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 377) Public Resources Code Section 21083.3 is one of these exemptions. The California Supreme Court "does not sit in

review of the Legislature’s wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation and legislative amendment.” (*Id.*) Just as the California Supreme Court does not question the legislative wisdom of these statutory exemptions, the Commission should dismiss the Staff’s attempt to circumvent these statutory mandates.

Staff argues that Section 21083.3 should not be applied based on “general principles of CEQA, which require it to be interpreted in such as way as to provide the fullest possible protection to the environment within the reasonable scope of the statutory language.” (9/29 RT 205) This is the very type of argument which the Court has rejected:

“[i]n construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language.” (*People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475 [224 P.2d 677]; see also *Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 217 [234 Cal.Rptr. 316].) Moreover, it defeats the very purpose of the exemption to apply it only to projects that will have no significant environmental effects. The determination that “a project may have a significant effect on the environment” is the finding that, absent an exemption, ordinarily triggers the environmental review process. (§ 21082.2, subd. (a).) It is precisely to avoid that burden for an entire class of projects that the Legislature has enacted the exemption.” (*Napa Valley Wine Train, Inc. v. Public Utilities Com., supra*, 50 Cal.3d at p. 383.)

Moreover, in the case of Public Resources Code Section 21083.3, the Legislature expressly anticipated that parties might cite the principles of liberal construction to eviscerate the specific limitations set forth in Section 21083.3 and related provisions. Therefore, the Legislature emphatically provided in Section 21081 as follows:

It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.”

Thus, both the Legislature and the California Supreme Court have clearly directed that where a statutory exemption applies, the Commission has no authority to burden the WEC with unnecessary environmental review or additional mitigation, and therefore, could not make itself clearer that it is improper to impose additional mitigation requirements. Such a burden would be even more onerous where, as here, the impacts of the WEC are so clearly insignificant.

IV. GENERAL CONDITION OF CERTIFICATION – COM 8

The Applicant and Commission have the same basic objective of ensuring facility safety. The Applicant, which is a public agency, has been committed to the goal of ensuring the security of generating and transmission facilities long before the events of September 11, 2001 focused national attention on these important issues. Following 9/11, the Federal Energy Regulatory Commission (FERC) required vulnerability assessments/security for all FERC licensed projects. TID completed those assessments and plans and was deemed to be in compliance by the FERC. TID conducts and participates in regional exercises with the County Office of Emergency Services on a variety of scenarios addressing public safety. These exercises are conducted yearly. (Ex. 45, p. 42)

Because of the Applicant’s ongoing commitment to security and public safety, the Applicant has concerns with certain provisions of Condition COM-8 as proposed by the Staff. The Applicant is suggesting revisions to COM-8 to clarify the language and to ensure that the Applicant retains both the obligation and the right to ensure the safety of the facility. These suggested revisions are set forth in the Applicants direct testimony, Exhibit 45, at pages 42-47.

For the most part, the Applicant's proposed COM-8 simply reorganizes and clarifies the language proposed in the FSA. The most significant change proposed by the Applicant relates to the nature of review by the CPM of the Project Owner's Security Plans. We discuss the major revisions below.

A. The Construction and Operation Security Plans Should be Available for Review and Comment by the Staff.

Both the Staff and Applicant agree that the Applicant should develop, implement and maintain site-specific Security Plans for the construction and operation phases of the project. While the Staff recommends that the Plans be maintained for review and approval by "Energy Commission personnel, the Applicant recommends that the Plans be maintained for review and comment by the Staff.

In the absence of any evidence that the Staff is qualified to review Security Plans and in the absence of any evidence that the review will be conducted in accordance with any clearly-articulated objective standards, the Staff has failed to meet its burden of proving that a condition requiring Staff approval is reasonable.

The Staff has not demonstrated that it has or will have personnel competent to review a Security Plan. The Staff has been unable to even state the qualifications for review or security clearance. (10/9 RT 107) The Staff has offered no evidence, let alone substantial evidence, to support its claim that the Staff's witness (a consultant) or Staff members have the knowledge or expertise to perform this task. Staff's witness admittedly has never written a Security Plan for a specific power plant, and there was no evidence offered to suggest that any Staff member has written such a plan. (10/9 RT 124) Staff's witness has never even reviewed such a plan, and there is no evidence to suggest that any Staff member has reviewed such a plan. (*Id.*) The Staff's witness has no experience regarding the operation and security of a power plant in

California and no experience in law enforcement, and there was no evidence that any Staff member has such expertise in the context of Security Plans. (*Id.* at 124-125)

TID, on the other hand, has the knowledge, skill, expertise, and experience required to ensure powerplant security from all threats. TID has written and implemented Security Plans for specific power plants within its District. TID has direct experience in operation and security of power plants. For example, not all powerplant security issues are related to potential terrorism. TID's witness testified that the District regularly consults with the City of Turlock Police Department, the Stanislaus County Sheriff, the California Highway Patrol, and local FBI representatives on matters related to security, in general, and potential criminal activity, in particular. (10/9 RT 12, 16-22)

Given the Project Owner's qualifications, knowledge, skill, expertise, and experience with all aspects of power plant security, the Staff has not shown how the public interest is served by removing the authority of those who are capable and qualified and transferring such authority to unidentified personnel with unspecified qualifications and most certainly no local knowledge and no relationships with local officials to match those possessed by the District. Indeed, the public interest may be harmed. Further, there is a decided public interest in allowing the District to maintain uniformity of security operations across all of its facilities -- Commission jurisdictional and non-Commission jurisdictional facilities.

Not only are the Staff's qualifications and expertise to review and approve Security Plans unproven by the evidence in the record, alarmingly, Staff has provided no clearly-articulated, objective standards or criteria upon which to base their approval. In layperson terms, the Staff has not identified "the bar" or how applicants may clear that bar. The "bar" is the appropriate

metaphor, given that the Staff's disapproval – for whatever reason -- of either a construction or operation Security Plan will bar construction and operation of the WEC.

While there are some laws and regulations relating to the handling and storage of hazardous materials, the Staff has cited no clear standards regarding the sufficiency of additional security measures to protect such material from external events. (10/9 RT 93-94) While Staff is reportedly in the process of engaging in internal meetings and drafting proposals for standards, there is no certainty as to whether or when such meetings and drafting will be complete, or when such standards will be presented to power plant operators and adopted by the Commission. In the absence of such standards, Staff has absolutely no sound and clearly-articulated, objective basis by which to determine whether a Security Plan is complete and whether the Security procedures and measures are reasonable and adequate. An umpire cannot call balls and strikes until the strike zone is defined. The Staff cannot approve a Security Plan until the criteria by which to judge the adequacy of the plan are equally defined by a thoughtful public process. In the absence of clearly-articulated, objective standards, a requirement that the Security Plans be “approved” by the Staff before the facility can commence construction or operation, will subject the project to a high risk of delay or disapproval based on arbitrary or personal criteria.

The Applicant is also concerned with the Staff proposal that the CPM may unilaterally mandate additional measures in the Security Plans “depending upon the unique circumstances, the unique facility, and/or in response to unspecified ‘industry related’ security concerns.” (10/9 RT 103) To say that every project will require unique, site specific security measures is both uninformative and, frankly, circular reasoning. Every site is, by definition, “unique.” No two sites are the same, just as no two projects are the same. We find wholly untenable both (1) the uncertainty of not knowing what “unique” or site-specific requirements the staff might

unilaterally impose, and (2) the draconian sanction of stopping construction or shutting down operations without having adequate recourse to a proper appeal process should the project owner or local law enforcement officials disagree with Staff's requirements.

For example, in this proceeding Mr. Greenberg testified that some plants may have security guards, some may not need guards at all. (10/9 RT 82-83) Yet, in a recent proceeding he testified that "The use of different hazardous materials could result in a different level of security needed at differing power plants. *But, certainly during construction and operations, a gate guard would be necessary*, probably not 24 hours a day, seven days a week during operations, but *certainly during normal working hours. During construction there would probably need to be a guard there for 24/7.*" (10/16/02 RT 514, EAEC 01-AFC 4, emphasis added)⁴

It is this very type of random application of criteria which would be spawned by granting the Staff approval authority (and the authority to unilaterally change plans) without defined standards of accountability. In one case, guards are required – in the next case, they are not. One day, guards are required – the next day they are not. Since every project is unique, a lack of standards for determining in each case the appropriate level of security required will necessarily lead to arbitrary requirements.

To be clear, TID is not suggesting that the Commission simply leave the security process to the District. On the contrary, the District's witness clearly stated that he envisions a "collaborative" process wherein Staff and District discuss security issues. Accordingly, while the Applicant believes it is premature to grant the Staff the authority to "approve" site-specific Security Plans, we do welcome review and comment by the Staff. We look forward to a collaborative process. We believe that there is much we can teach the Staff regarding

operational security. And, in the event that the Commission subsequently adopts standards of general applicability regarding the contents and sufficiency of Security Plans, it may then be appropriate for the Staff to have the authority to approve the plans in accordance with such standards.

B. The Vulnerability Assessment Plan Should be Available for Review and Comment by the Staff.

The Applicant has also proposed language that would allow the Staff to review and comment upon the vulnerability assessment prepared by the Project Owner. The Applicant does not believe that Staff should have the authority to “approve” the vulnerability assessment for the same reasons stated above. Just as the Staff’s witness has never written, nor even read, a site-specific Security Plan for a power plant, he has similarly neither written, nor even read, a vulnerability assessment for a power plant. (10/9 RT 124) Because the requirement for preparing a vulnerability assessment is so new, no other project has yet prepared such an assessment, and thus there is no “model” or “example” of an approved plan for TID to follow. (10/9 RT 158-159)

The Staff’s lack of experience with vulnerability assessments is reflected in the language of Staff’s proposed condition. Staff proposes that the “assessment shall be consistent with US EPA, US Department of Justice, and Energy Commission guidelines.” (Staff Supplemental Testimony, p. 14) However, there are no Energy Commission guidelines. (10/9 RT 116). There are no EPA guidelines. (*Id.* at 114) And the “US Department of Justice Guidelines” are not guidelines either, but are instead simply a “prototype vulnerability assessment methodology developed for chemical facilities.” (Ex. 57, forward) According to the document, “This vulnerability assessment methodology is therefore focused primarily on terrorist or criminal

⁴ The Applicant requests that the Committee take official notice of the referenced Commission proceeding.

actions that could have significant national impact (e.g., through the loss of chemicals vital to the national defense or economy) or cause releases of hazardous chemicals that would compromise the integrity of the facility, cause serious injuries or fatalities among facility employees, contaminate adjoining areas, and cause injuries or fatalities among adjoining populations. *Thus the use of this vulnerability assessment methodology should be limited to these areas.*” (*Id.*, emphasis added) Although parties are admonished to limit the use of this methodology to areas of high risk at major chemical facilities, the Staff proposes to require operators of power plants to prepare vulnerability assessments which are “consistent with” this prototype. The Applicant respectfully suggests that the Chemical facility prototype proposed by the Staff may be out-of-scale to the typical California gas-fired power plant. (10/9 RT 116)

The Department of Energy, Office of Energy Assurance, has published a “DRAFT VULNERABILITY ASSESSMENT METHODOLOGY” for Electric Power Infrastructure. (Ex. 58)⁵ The purpose of this report is not to mandate a single methodology, nor to suggest the need for regulatory oversight. Instead, “The purpose of this report is to provide a methodology resource for the electric power industry. No one vulnerability assessment methodology has all the answers. *Companies should consider for themselves the applicability of the vulnerability assessment elements to their individual situation. Each company should determine which elements are applicable (if any) along with the appropriate level of detail.*” (Ex. 47, p. 4)

As the Department of Energy states, each company should consider for themselves the applicability of assessment methodologies to their individual situations. The Staff seems to agree: “MR. VALKOSKY: Is the Applicant free to choose any template or guideline?

MR. GREENBERG: Yes.” (10/9 RT 133)

⁵ This document is discussed during the evidentiary hearings at 10/9 RT 118, and was assigned Exhibit #58. Staff subsequently provided a copy of the document to the Committee.

Therefore, while the Staff may have input into the Assessment, the Staff should not have the authority to mandate or approve a company's assessment.

C. COM-8 Requires a Workable Dispute Resolution Mechanism.

In this proceeding, the Applicant proposed a specific dispute resolution mechanism for resolving potential differences between Staff and Applicant regarding Security Plans. In response to questions from the Committee during the hearings, we certainly recognize the complexity of issues surrounding such mechanisms. Of course, if the Committee adopts the Applicant's proposed language regarding Staff's review and comment of Security Plans, such mechanism is not necessary. On the other hand, if the Committee were to grant Staff limited approval authority, further discussion of dispute resolution will be necessary. We understand that Staff will outline possible existing dispute resolution mechanisms in their Opening Brief. We look forward to reviewing this information.

D. COM-8 Raises Matters Of Statewide Importance and Should Be Addressed In A Statewide Forum.

The recommendations raised in the revisions to COM-8 are serious and well intended suggestions to improve the security surrounding the handling of hazardous materials. Because of the importance of these recommendations and because they are applicable to all facilities within the State that handle hazardous materials, the Commission should consider these proposed revisions to the Commission's general licensing conditions in a Statewide forum in which the public and all current and future project owners may participate.

V. CONCLUSION

With only four exceptions, Applicant and Staff have agreed upon all of the proposed Conditions of Certification for this Project. As shown in this Brief, in each of these cases, the Applicant's position has merit and should be adopted by the Commission.

The Applicant hopes and plans to construct the Walnut Energy Center in the immediate future. The WEC will be a high efficiency, combined-cycle facility that will be integrated into TID's plans to meet its growing native load, and provide other ancillary services and benefits to TID. To fully realize these benefits, the WEC must receive timely approval from the Commission. We look forward to the Committee's issuance of the PMPD at its earliest convenience.

Respectfully submitted,

Dated: October 31, 2003

ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

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