

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF MARYLAND**

IN THE MATTER OF:

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THE APPLICATION OF CATOCTIN  
POWER LLC FOR A CERTIFICATE  
OF PUBLIC CONVENIENCE AND  
NECESSITY TO CONSTRUCT A  
NOMINAL 600-MW GENERATING  
FACILITY IN FREDERICK COUNTY,  
MARYLAND

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Case No. 8997

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**BRIEF ON BEHALF OF THE  
BOARD OF COUNTY COMMISSIONERS OF  
FREDERICK COUNTY, MARYLAND**

The Board of County Commissioners of Frederick County, Maryland, a body corporate and politic of the State of Maryland (“Board”), appreciates this opportunity to summarize those conditions that the Board has requested be made part of any certificate of public convenience and necessity (“CPCN”) that the Maryland Public Service Commission (“PSC”) might issue Catoctin Power, LLC, a wholly owned subsidiary of Sempra Generation (collectively “Sempra”), in this matter. In February 2004, Sempra asked the PSC to authorize the siting, construction and operation of an approximate 640 MW gas fired electric power generating plant, costing an estimated \$300 million, in south Frederick County, that would directly impact in multiple ways the quality of life for the citizens of Frederick County, particularly those residents of the Adamstown area. Since this filing, the Board has participated in several hearings and submitted testimony to the PSC on site plan, ambient air quality, water, land preservation and other relevant issues in this matter.

Through its testimony in this proceeding, the Board has requested that certain conditions be made part of any CPCN that the PSC might issue Sempra. These conditions concern, among other issues, the project's site plan, ambient air quality in the Adamstown area, Sempra's preferred purchase of the Board's effluent (sometimes referred to as "treated wastewater"), possible discharge of Sempra's plant wastewater into and through the County's effluent discharge system, drawing water directly from the Potomac River (Sempra's proposed secondary water source), and land preservation and quality of life issues. The Board's specific requests for conditions are summarized in Exhibit A, attached to and by reference made a part of this brief.

In this brief, the Board will address only its requested conditions. The Board has noted, though, that the State of Maryland acknowledged in its Agreement of Stipulation and Settlement with Sempra filed on January 12, 2005 in this proceeding, that the State is "in agreement that the issuance of a CPCN for the Project... is in the public interest." The decision not to address this issue in this brief, or otherwise, does not indicate that the Board agrees with the State on the issue of public need for Sempra's proposed project.

#### **SITE PLAN:**

On July 12, 2004, the Board held a public hearing on Sempra's proposed project, at which time the Board asked Sempra to voluntarily submit its proposed project site plan for review by the Board's staff and by the Frederick County Planning Commission. The purpose of the Board's request was to remove issues of whether Frederick County land use, site plan and permit requirements have been pre-empted (either in whole or in part) by authority granted to the PSC. As Robert Dalrymple, Esq., a land use expert retained by Duke Energy North America to address this identical issue in Duke Energy's application for a CPCN to locate a similar electric

power generating plant in south Frederick County, testified before PSC Hearing Examiner Joel Bright on February 11, 2002 in Case 8891, “Again, I think that the state law as interpreted by the cases I’ve cited earlier is somewhat ambiguous in terms of how far the issue of preemption extends, and whether or not it does extend to include the preemptive site plan review process or doesn’t is an issue or question that Duke Energy would prefer not to force.” (Case 8991 hearing transcript page 1895, lines 17-23, and page 1896, line 1).

Sempra apparently agreed with Duke Energy as Sempra voluntarily submitted its proposed site plan to Frederick County Government for review. This process included consideration of the proposed site plan by several County agencies including Frederick County’s Division of Permitting and Development Review, which co-coordinated this process. After the initial review of Sempra’s proposed site plan, Sempra and Frederick County staff met to discuss the County agencies’ concerns. As a result of this meeting, Sempra revised its site plan drawings and responded to the County’s concerns in its August 9, 2004 letter. The Frederick County Planning Commission then considered Sempra’s proposed site plan. The end result of this process was the site plan reflected in the Board’s proposed conditions, numbers 1 through 6, of Exhibit A attached hereto, which on September 23, 2004 the Board (by unanimous vote with one Commissioner absent) directed be submitted to the PSC as proposed CPCN conditions. This request was presented to the PSC in testimony the Board submitted on September 30, 2004. Sempra’s agreement with these site plan conditions was acknowledged by Mr. Richard Zwolak (Sempra’s land use expert) on October 14, 2004 when he testified, “Catoctin Power, LLC has committed to complying with the site plan conditions that were part of the review process.” (Hearing transcript, sometimes abbreviated as “TR”, page 630, lines 4-6). Mr. Zwolak also testified that he believed the Board had made a similar commitment or agreement to these site

plan conditions and that he understood the Board would be presenting these site plan conditions as recommended CPCN conditions. (TR page 628, lines 3-21).

**AMBIENT AIR QUALITY:**

As noted above, on September 23, 2004 the Board considered the proposed site plan and various other issues relating to Sempra's proposed project. In addition to those proposed conditions relating to the site plan that were previously discussed, the Board, by unanimous vote with one Commissioner absent, also directed that the PSC be asked to add two ambient air quality conditions to any CPCN that the PSC might issue to Sempra. These ambient air quality conditions concern Sempra's acquisition of NO<sub>x</sub> and VOC offsets and compliance with regulations relating to PM 2.5 (fine particulate matter with a diameter smaller than 2-1/2 microns). The Board's requested conditions on these matters are set forth as conditions 7 and 8 in Exhibit A, attached hereto. The Board does not believe that Sempra objects to either of proposed conditions 7 or 8.

In addition, Mr. Don James, a Frederick County citizen that intervened in this proceeding, has proposed that Sempra be required to conduct local air quality testing in the Adamstown region of Frederick County. This proposed condition was identified as "James – 1" and set forth in detail on page 77 of Sempra's "Exhibit A – Proposed CPCN Conditions Summary Matrix" to Mr. Gordon Chirdon's rebuttal testimony, introduced in this proceeding as Catoctin Power Exhibit 26 on January 12, 2005. Mr. James' proposed condition was also subject to testimony and discussion at the January 12 hearing in this matter. The Board has not taken a position on Mr. James' requested CPCN condition.

**WATER:**

On November 23, 2004, the Board submitted its water issue testimony through Mr. Michael G. Marschner, Director of Frederick County's Division of Utilities and Solid Waste Management. These concerns are reflected in the Board's proposed CPCN conditions, numbers 9 through 14, set forth in the attached Exhibit A. This testimony addressed Frederick County's present water line expansion project including the future construction of the County's new McKinney wastewater treatment plant. In addition, the Board discussed its future ability to possibly supply effluent to Sempra and others. The essence of this testimony was that any CPCN that the PSC might issue to Sempra should specify that it did not, and should not be construed or interpreted to, require the Board to supply either potable water or effluent to Sempra or require the Board to permit Sempra to discharge its condensed wastewater into and through Frederick County's effluent discharge system; Sempra's wastewater discharge will contain levels of chemicals that are at least 7 times more concentrated than the County's effluent. If the PSC decides to issue a CPCN to Sempra for this project, the Board might (or might not) decide to supply effluent to Sempra, but if the Board elects to do so it will be on the basis of (1) a prescribed effluent rate, terms and condition structure (such as is presently done for potable water) that the Board might establish, (2) by contract on such terms as the parties might agree, or (3) through a competitive bid procedure on such terms and conditions as the Board might establish and which might otherwise be required by law, if any. In any event, whether the Board chooses to supply effluent to Sempra or to allow Sempra to discharge its concentrated wastewater into and through Frederick County's effluent discharge system are decisions solely within the Board's discretion. To prevent any question whatsoever in this regard, any CPCN that the PSC might issue to Sempra should be so clarified. Even if the PSC chooses not to so clarify a

CPCN, the Board's position is clear: whether Sempra is supplied with Frederick County effluent or allowed to discharge into the County's effluent discharge system are decisions that rest solely with the Board and such supply or permission shall be on those terms and conditions that the Board believes appropriate.

In addition to the clarifications discussed immediately above, concerns relating to other water issues were addressed in the Board's November 2004 testimony. The Board believes that Sempra has already committed to several of these items, such as obtaining a separate NPDES permit if allowed to discharge into and through Frederick County's wastewater system.

Further, at the January 12, 2005 public hearing in this proceeding, held at Tuscarora High School, Frederick, Maryland, Ms. Lisa Baugher, appearing as Legislative Aide for Maryland Delegate Rick Weldon, proposed that any CPCN that might be issued Sempra in this proceeding contain the condition that all water issues must be resolved before Sempra be allowed to begin construction. (TR pages 1309-10). In addition, Mr. Marcel Aillery proposed a CPCN condition to the effect that Sempra should not receive the benefits of being "grandfathered" in the event of any future change in low or minimum flow requirements on the Potomac River. (TR page 1298). In response to Mr. Aillery, Sempra stated that it was required to comply with all changes to river flow requirements (TR pages 1328-29, 1339). The Board has not taken a position on either of these requested conditions.

**LAND PRESERVATION:**

Finally, on October 21, 2004, the Board decided, by a 3 to 1 vote with one Commissioner absent, to request that the PSC require, as a condition to any CPCN that might issue in this proceeding, that Sempra first work with EastAlco Aluminum - the entity that requested Sempra

to develop and operate this project on EastAlco land and from whom Sempra would lease the real property on which the proposed plant would be located - to place approximately 250 acres of land located in the general vicinity of the proposed plant into permanent agricultural preservation. On several occasions, EastAlco has committed to the Board that EastAlco would place a portion of its approximate two thousand (2,000) acres of land located in this area into permanent agricultural preservation. If this is not possible, the Board requests that Sempra be required to work with the Carrollton Manor Land Trust (a repository of knowledge concerning land located in the general vicinity of Sempra's proposed plant that might be available for permanent agricultural preservation) to achieve this same result. The Board also expressed a preference for two specific parcels of land, totaling approximately 300 acres, presently zoned agricultural, located north of the proposed Sempra plant and which are located partially in-between the proposed plant and St. Matthew's Lutheran Church (this land wraps around St. Matthew's Church and graveyards). These preferred parcels were specifically identified in the Board's testimony submitted by Mr. Marschner in November 2004 and in more detail by the Board's rebuttal testimony submitted through Mr. Gary Hessong, Director of the Frederick County Division of Permitting and Development Review, in December 2004. These parcels are again identified in the Board's proposed condition, number 15, in Exhibit A attached hereto.

The Board's purpose in asking that approximately 250 acres be set-aside in permanent agricultural preservation is (1) to offset negative impacts of the proposed plant on the quality of life of Frederick County citizens, and (2) to serve as a buffer between the plant and the community. Testimony throughout this proceeding has reflected that the quality of life for the citizens of the Adamstown area, if not for all citizens throughout Frederick County, will be impacted by construction and plant operation traffic and noise. The construction and operation

of this plant will further increase the pollutants in Frederick County air (irrespective of Sempra's purchase of NOx and VOC offsets), increase the demands upon County fire and rescue services, increase the exposure of citizens to hazardous materials and possibly decrease property values. Given these factors, it is not surprising that the Board might have sought a means, through land preservation, to mitigate these negative project impacts and help preserve the quality of life for the residents of the Adamstown area.

Furthermore, given the Board's preference that the two parcels adjacent to St. Matthew's Church be set aside into permanent agricultural preservation, it is obvious the Board believes a further buffer, in addition to site plan requirements, would also help shield St. Matthew's Church and graveyards from Sempra's proposed plant and encroachment of non-agricultural uses. Other than expressing a preference for the two specific parcels and identifying the purpose of this land preservation, no requirement that any specific property be set aside in permanent agricultural preservation was made by the Board; the Board did not restrict its request to land that is presently zoned agricultural, perhaps recognizing that the majority of EastAlco property surrounding the proposed plant site is zoned general industrial which may also be subject to permanent agricultural preservation easements. At the January 12, 2005 rebuttal testimony hearing in this matter, Mr. Don James, an Adamstown resident that intervened in this PSC proceeding, suggested that a particular section of EastAlco's general industrial zoned property located north of Sempra's proposed plant and south of St. Matthew's Church would be appropriate to be placed into permanent agricultural preservation. The acreage of this property was computed by Mr. Richard Zwolak to be approximately 155 to 160 acres. When certain additional adjacent land was added to the property suggested by Mr. James, the total acreage as

computed by Mr. Zwolak was estimated at between 210 and 220 acres. (TR page 1129). This land would also serve the Board's purpose.

**BOARD REQUEST:**

For the above discussed reasons, the Board of County Commissioners of Frederick County, Maryland, a body corporate and politic of the State of Maryland respectfully requests that if the PSC sees fit to allow Sempra to locate, construct, and operate its proposed \$300,000,000.00 (three hundred million dollar), approximate 640 MW gas fired electric power generating plant on EastAlco property in south Frederick County, the Board's proposed conditions set forth in Exhibit A attached hereto be made a part of any CPCN that the PSC issue to Sempra.

## **EXHIBIT A**

### **BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND PROPOSED CONDITIONS**

#### **SITE PLAN CONDITIONS:**

1. Catoctin Power shall design and construct its proposed plant in accordance with that project site plan which resulted from Catoctin Power's voluntary submittal of a proposed site plan to Frederick County Government for review, as described in the Board of County Commissioners of Frederick County, Maryland's testimony in PSC Case 8997 submitted through Mr. Gary Hessong on September 30, 2004 (adopted by and admitted as an exhibit in this proceeding through the testimony of Ms. Betsy Smith on December 9, 2004). This site plan is reflected by the following items and also includes those other matters set forth below in numbered conditions 2 through 6:
  - Catoctin Power's August 9, 2004 letter to Mr. Gary Hessong that provides Catoctin Power's responses to each concern raised by Frederick County Government;
  - That aerial photograph of the project site and four site drawings (Cover Sheet 1, Revision 0 dated 6/24/04; Sheet 2, Revision 2 dated 8/9/04; Preliminary Stormwater Management Site Plan Sheet 3, Revision 0 dated 6/16/04; and Sediment and Erosion Control Site Plan Sheet 4, Revision 0 dated 6/16/04) attached to Catoctin Power's August 9, letter; and
  - That September 16, 2004 memo from Bruce Dell, Principal Planner of Frederick County's Division of Permitting and Development Review ("DPDR") to Assistant County Attorney Richard J. McCain, specifically the "Site Improvement Plans" requirements found on pages 1 and 2 of this memo.

2. Dead or missing trees along Manor Woods Road shall be replaced (and thereafter maintained) with living trees.
3. The project's structures shall be of earth tone colors to blend with the surrounding areas.
4. Catoctin Power must work with applicable state, federal and local agencies, including the Maryland Department of the Environment, to mitigate any wetland disturbances.
5. Catoctin Power shall prepare, obtain and implement stormwater management plans (including grading, sediment and erosion control plans) in accordance with applicable federal, state and local laws. Catoctin Power shall submit the stormwater management plans to DPDR prior to implementation, if not otherwise obtained from Frederick County Government.
6. Prior to beginning site work at the project, Catoctin Power shall obtain (and thereafter comply with) general building, electric, plumbing and fire protection permits from Frederick County Government.

**AMBIENT AIR QUALITY CONDITIONS:**

7. Catoctin Power shall obtain NO<sub>x</sub> and VOC offsets from Frederick County sources, if available; if not available from Frederick County sources, then these offsets must be purchased from the geographically closest available sources.
8. Catoctin Power shall comply with all federal, state and local PM 2.5 (fine particulate matter with a diameter smaller than 2-1/2 microns) ambient air quality standards in effect today and which might be required in the future.

## **WATER ISSUE CONDITIONS:**

9. The CPCN shall not, nor shall it be interpreted to, require Frederick County Government to supply treated wastewater (“effluent”) or potable water to Catoctin Power.
10. The CPCN shall not, nor shall it be interpreted to, require Frederick County Government to allow Catoctin Power to discharge wastewater into or through the County’s wastewater discharge system.
11. If the Board of County Commissioners of Frederick County, Maryland decides, in its sole discretion, to supply effluent to Catoctin Power, or allow Catoctin Power to discharge wastewater into or through the County’s effluent discharge system, Catoctin Power shall comply with all applicable laws and requirements that the Board might establish.
12. It is specifically recognized that the Board might establish water quality requirements for Catoctin Power’s wastewater before allowing it to be discharged into and through the County’s wastewater discharge system (possibly to allow this wastewater to be used by other properties along the County’s discharge system) and that these requirements might require treatment of the wastewater by Catoctin Power prior to discharge into or through the County’s system.
13. Catoctin Power shall obtain a separate NPDES user discharge permit prior to discharging wastewater into or through the County’s effluent outfall system.
14. Any special effluent water quality requirements that might be placed on Catoctin Power’s use of effluent water shall be based on sound technologically feasible methods of determining the “real time” quality of the effluent water and such methods shall be first validated based on the actual water quality leaving the County’s wastewater treatment

facility. Any such limits shall be placed on Catoctin Power's use of the water and not apply to Frederick County or the County's NPDES permit.

**LAND PRESERVATION CONDITION:**

15. Catoctin Power shall work with EastAlco Aluminum, the entity that requested Catoctin Power to locate its plant at the proposed site and that is leasing Catoctin Power the property for this project, to place approximately 250 acres of land located in the general vicinity of the plant into permanent agricultural preservation to (1) offset negative impacts of the plant on the quality of life of the citizens of south Frederick County, and (2) serve as a buffer between the plant and the community including but not limited to St. Matthew's Lutheran Church. If this is not possible, Catoctin Power shall work with the Carrollton Manor Land Trust to identify and locate land to achieve the same result. The Board's preference for property to be placed into permanent agricultural preservation are two parcels of land, partially located between Catoctin Power's plant and St. Matthew's Church and which wrap around St. Matthew's Church and graveyards, including:

- Account identifier – district 23, account number 437457, tax map 94, grid 3, parcel 76 – 144 acres west of Ballenger Creek Pike adjacent to St. Matthew's Church that is owned by EastAlco; and
- Account identifier – district 01, account number 005391, tax map 94, grid 4, parcel 3 – 169.17 acres located on the east side of Ballenger Creek Pike, also owned by EastAlco.

**CERTIFICATE OF SERVICE**

**PSC Case 8997**

I hereby certify that on this 7th day of February 2005, I served by first class mail, postage prepaid, and by electronic transmission (where available) copies of the Brief on Behalf of the Board of County Commissioners of Frederick County, Maryland to the parties listed on the official service list for PSC Case 8997 dated December 13, 2004.

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Richard J. McCain  
Assistant County Attorney  
Frederick, County, Maryland