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01-AFC-7C	
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 11 Homeowners and Hayward Area Planning Association

12 STATE OF CALIFORNIA

13 STATE ENERGY RESOURCES

14 Conservation and Development Commission

15 In the Matter of:

16 Initially noticed as "Petition to Amend the
 17 Commission Decision Approving the Application
 18 for Certification for the Russell City Energy
 19 Center";

20 Later Noticed as "Modification of the Application
 21 for Certification for the Russell City Energy
 22 Center"

Docket No.: 01-AFC-7C

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF GROUP
 PETITIONERS' PETITION TO
 INTERVENE, REOPEN THE
 ADMINISTRATIVE PROCEEDINGS,
 REOPEN THE EVIDENTIARY RECORD
 AND FOR RECONSIDERATION; And
 REQUEST FOR STAY OF COMPLAINE
 PROCEEDINGS**

Date: TBD
 Location: TBD
 Time: TBD

INTRODUCTION

As Commissioner Geeseman recently stated during an interview with the California Report aired by NPR/KQED on October 19, 2007, after this Commission's approval on September 26, 2007 of the 600-megawatt gas turbine thermal power plant known as the Russell City Energy Center ("Russell"), California has overly relied on natural gas plants. Also the day after the Commission's effective approval and the hearing on September 26, 2007, Calpine, a majority owner of Russell (or "applicant") filed its fourth amended disclosure with the New York Federal Bankruptcy Court revealing that the same engines which the applicant states will be used for Russell and could not be replaced with superior technology as urged by the CEC's staff, may have been sold; and that in the West the supply of power has increased during this decade while the demand has decreased. *In re Calpine Corporation, et al.*, United States Bankruptcy Court, Southern District of New York, No. 05-60200 (BRL).¹

Additional new information which has developed since the Commission's September 26, 2007 hearing which was not available until after the hearing is that the Alameda County Land Use Airport Commission found that posting "notices to airmen" or "NOTAMs" did not constitute a mitigation for the loss of or restriction of airspace. These are simply warnings, not mitigations. Group petitioners, which include the statewide organization California Pilots Association, agree. Also, contrary to Calpine's representations to the Alameda County Land Use Airport Commission, the power plant over which Caltrans Aeronautics Pilot Gary Gatheley flew in Yolo County known as Sutter, was *smaller* in size, *not* the same size as represented by the applicant's representative present at that hearing. As a result, Group Petitioners' present evidence that the severe turbulence experienced by the Caltrans Aeronautics Pilot Gary Gatheley, who investigated flying over thermal

¹ See Exhibit 7 to accompanying declaration of Jewell J. Hargleroad attaching portions of Calpine's bankruptcy filing filed the day after the CEC hearing.

1 plumes for the CEC due to the complaints received from pilots utilizing the Blythe Airport, was
2 turbulence over a smaller power plant and at a higher elevation, 1,000 feet, not 800 feet.

3 Likewise, as revealed by the supporting declarations offered by Group Petitioners, there is
4 substantial evidence that this project will have a significant effect on the environment and public
5 health and that the almost 1.3 million pounds of pollutants and toxins are not mitigated as the
6 CEC's staff also has admitted. Further, the evidence unambiguously establishes that this project
7 was not properly processed and the public was not adequately or meaningfully informed or
8 provided the opportunity to participate through their elected representatives. In fact, critical
9 information submitted by the public, such as that offered by Michael Toth raising serious
10 challenges to the methodology and analysis applied in evaluating the Russell project, was
11 excluded from these proceedings.

13 Nor, for that matter, does the CEC have the consent or appropriate input from the local
14 jurisdictions, the City of Hayward and the County of Alameda ("County") or any of affected
15 unincorporated districts whose residents like those in the City will be adversely impacted. As
16 established by the public record, the public in both the City of Hayward ("City") and the County
17 to date have been deprived of reviewing this project with their elected officials who have the best
18 resources available to direct their staff to investigate and analyze the significant public health and
19 environmental risks. The importance of that fundamental exercise protected by the state and
20 federal Constitutions is starkly established by a comparison between the City's response to the
21 Eastshore proposal, which specific project was reviewed by the public before the Hayward City
22 Council this year, and the Russell proposal, which was not.

24 As to the City's "contractual agreements" with the various owners and applicants for
25 Russell, Group Petitioners contend that these and the alleged "full support" of City staff are
26 entitled to *no* weight as a matter of law. Based on the evidence before the CEC, this question and
27 the City contracts entered into with the various owners of this project should be referred to the
28

1 California State Attorney General's Office for its opinion to the CEC as to what weight, if any,
2 should be given to the City's position in this proceeding.

3 This Final Decision also must be reconsidered as a matter of law on the ground that this
4 project "does not conform with [the] applicable state, local or regional standards, ordinances, or
5 laws." (Pub. Resource Code, Sec. 25525.) The Hayward General Plan was amended in 2002 and
6 as the CEC staff have observed, the Russell project is inconsistent with the Plan as amended since
7 the 2002 amended Plan changes "industrial" to a "knowledge based" use, a use inconsistent with
8 "heavy industrial."² As to conformance with County ordinances standards and laws, no one ever
9 asked.³

11 Likewise, since 2002, California's Senator Diane Feinstein successfully negotiated
12 acquiring property next door (or very nearby) to Russell, which is one of the largest restoration
13 wetland projects in the West. As for "necessity" required to be found to overcome this
14 nonconformance as set forth under section 25525, based on Calpine's own affirmative
15 representations to the New York federal court the day after this hearing, power supplies have
16 grown, while demand in the West has decreased. According to the CEC's own webpage public
17 records, there are approximately twenty power plants certified which have yet to be built.

19 Group petitioners submit that as a matter of law, this certification issued on September 26,
20 2007 must be revoked under section 25534 of the Public Resource Code⁴ and if the applicant

21 _____
22 ² Based on counsels and Group petitioners' short opportunity to review this 250 page Final
23 Decision, counsel and Group petitioners disagree that the "only real" disagreement between CEC
24 staff and the Commission has to do with aviation.

25 ³ Group petitioners agree that notice to such County agencies such as mosquito abatement are
26 appreciated, but that agency is not responsible for analyzing conformance with local land use laws.
27 Group petitioners agree that the Board of Supervisors who are the public's elected decision makers
28 and accountable to the public were due proper and adequate notice and a meaningful opportunity
to review and analyze this proposal with the appropriate agencies and counsel. The failure of that
notice in itself mandates reconsideration.

⁴ All references to sections are to the Public Resource Code unless otherwise specified.

1 wishes to pursue certification, that the application be properly submitted as a new application
2 following the procedural rules required as a matter of law.

3
4 **DEMAND FOR STAY OF COMPLAINE PROCEEDINGS**

5 Group petitioners demand that given the County of Alameda's filings and Group
6 petitioners' petition, any compliance proceedings for processing this new certification must be
7 immediately stayed. Based on the evidence presented by Group Petitioners and the County,
8 grounds exist to not only reconsider this certification, but to revoke any certification under 25534.

9 Additionally, this so called "Amendment" is improper and the applicant retains no vested
10 rights whatsoever in the certification obtained in 2002. In fact, as the Commission's docket
11 establishes, posted on June 14, 2007, just months prior to the five year expiration of this 2002
12 certification for the power plant known as "Russell," was a petition for ownership change
13 acknowledging that the originally certified project "is not yet under construction or in operation."
14 In fact, according to the applicant, it cannot build at this 2002 location.

15
16 One month later, on July 25, 2007, the new owner applied to "extend the deadline for
17 commencement of construction" from September 10, 2007 to September 10, 2008. But, as
18 admitted by the applicant, the new owner, it cannot build at this 2002 location. Group petitioners
19 contend that as a matter of law this new applicant was not entitled to an extension to build
20 something it had earlier acknowledged it could not build in the former owner's "amendment"
21 application in November 2006. Therefore, based on the applicant's own admission, this 2002
22 certification was unusable and any such request for extension should have been denied. Based on
23 the record, the applicant has no vested interest and any compliance proceedings must be
24 immediately stayed to enable the CEC to review the County and Group petitioners' petitions.
25
26
27

1 **BACKGROUND**

2 **A. The 2001 Rolling Blackouts And One Of The Largest Shifts In Wealth Out Of California**

3 As this Commission's own public web page admits, during 2001, California was
4 experiencing severe rolling blackouts resulting in power outages for hospitals and nursing home.
5 In the midst of this crisis, the joint venture Calpine and Bechtel applied for certification to
6 construct this 600-megawatt power plant in the City of Hayward, located virtually on the
7 wetlands, under proceedings for a six-month expedited siting process. (See generally, docket for
8 01-AFC-7 entitled "original proceedings.") Certification for this site by this owner was issued on
9 September 11, 2002.
10

11 Later on, California sought recovery of billions of dollars which the California Attorney
12 General contended was wrongfully transferred out of California based on a scheme of closing on-
13 line power plants for maintenance and selling power generated in California out of the state to be
14 resold to the state at a higher price. In 2005, Calpine petitioned for protection of the bankruptcy
15 courts. Construction of the Russell City Energy Center never commenced, while the population of
16 the City and surrounding unincorporated areas doubled, making it the third to fourth most densely
17 populated urban areas in the San Francisco Bay Area. In 2002, the City changed its land use
18 designation from heavy industrial to knowledge based research and development.
19

20 **B. The City Of Hayward's 2001 And 2005/2006 Contracts With The Former Owner**
21 **Calpine And The Decision To Locate A Power Plant Falling Within Alameda**
22 **County's Jurisdiction Without Seeking Its Land Use Review Or Approval.**

23 On February 6, 2001, noticed to be heard before the City Council was the following:
24 "Direction to Staff Regarding Preparation of Agreement Between City of Hayward and
25 Calpine/Bechtel for Proposed Russell City Energy Center." (Exhibit 1 to accompanying
26 declaration of Jewell J. Hargleroad ("Hargleroad.") The recommendation was to provide
27 direction on the preparation of a contract with Calpine/Bechtel "setting forth mutual obligations

1 and commitments in connection with the proposed Russell City Energy Center.” (Exhibit 1, p. 1.)
2 Although the introduction refers to “interest in locating a 600 megawatt energy facility” in
3 Hayward, the staff report represents that the Council

4 . . . ***is not being asked to determine if the proposed***
5 **use is appropriate for the referenced location.** Rather,
6 such a determination will be processed in the normal
7 fashion, **meaning that following a staff evaluation a**
8 **recommendation will be submitted to both the Planning**
9 **Commission and City Council.** In keeping with normal
10 practice, public hearings will be scheduled to provide the
11 community an opportunity to comment. Only following
12 the public hearings, will the Commission and Council
13 be asked to render their decision.

14 (Exhibit 1, pp. 2-3, emphasis and italics added.) Numerous promises were made, including “the
15 equivalent of wholesale power at a discounted rate to the City,” a total of \$500,000 to the
16 Hayward Education Foundation, and \$100,000 for youth programs for five years.

17 Five months later, on July 10, 2001, presented to the City Council was the following:

18 “Determination that the Proposed Power Plant (Russell . . .) at 3636 Enterprise Avenue is
19 consistent with the General Plan and the Industrial Zoning District Designation.” (Exhibit 2, p. 1
20 to Hargleroad.) The staff report states the following:

21 At this point in the review process, the City is being asked to
22 review and discuss whether the RCEC [Russell] power plant use is
23 consistent with the Industrial District of the Zoning Ordinance and the
24 General Plan. ***This report is not meant to review the merits***
25 ***of the project, nor any of its potential environmental impacts.***
26 There is a separate, distinct, and elaborate review process, with
27 ample opportunity for public input under the auspices of the
28 California Energy Commission.

(Exhibit 2, p. 2, emphasis and italics added.)

Four years later, on October 11, 2005, the City Manager presented for consideration
“Cooperation and Option Agreement Regarding Russell . . .” The recommendation was for the
City Council to authorize the City Manager to execute a cooperation and option agreement with

1 “RCEC-LLC in connection with the Russell City Energy Center.” (Exhibit 3, p. 1 to Hargleroad.)
2 Noted in the staff report was that “Much has changed since 2002,” and that “the property on which
3 Calpine planned to construct the RCEC is no longer available.” (Exhibit 3, p. 1.) Further, “[d]ue
4 to changed economic conditions and a more competitive pricing environment, Calpine reports it
5 can no longer provide the same level of support and still compete.” (Exhibit 3, p. 2.) All promises
6 for contributions were withdrawn with the exception of a contribution of \$10 million to “support”
7 the library. (Exhibit 3, p. 2.) Whether that contribution was or has been approved by the
8 Bankruptcy Court was not disclosed. Under the 2005 resolution, the City makes the following
9 findings:
10

11 WHEREAS, the City Council has previously found
12 that the development of a modern, clean source of reliable
13 energy is a benefit to the public health, safety and welfare; and

14 WHEREAS, changing circumstances have necessitated
15 consideration alternative sites for the location of the energy
16 center; and

17[P] [P] [P] [P] [P] [P]

18 BE IT FURTHER resolved that the *City Manager is*
19 *hereby authorized and directed to execute the attached Agreement,*
20 *And negotiate and execute any and all related agreements and*
21 *Documents necessary to carry out the purpose and intent of such*
22 *Agreement* in forms approved by the City Attorney.

23 (Exhibit 3, attached resolution, emphasis and italics added.)

24 On December 20, 2005, Calpine together with others petitioned for relief under chapter 11
25 of the Bankruptcy Code.

26 On May 23, 2006, next presented to the City Council was to “adopt the attached resolution
27 authorizing the City Manager to execute the First Amendment to the referenced Agreement with
28 Russell City Energy Center-LLC.” (Exhibit 4, p. 5.) Described was a new and different “property
swap.” Noted, however, was that “[t]he new layout of the RCEC will result in a portion of the
energy center **being constructed on land currently within the jurisdiction of Alameda County,**

1 although intended to be annexed into Hayward in the near future.” (Exhibit 4, p. 2 to Hargleroad,
2 emphasis added.) Under the attached resolution, the City makes the following findings:

3
4 WHEREAS, subsequent changes to the construction
5 configuration require substantive changes and revisions to the
6 Agreement with RCEC. NOW, THEREFORE, BE IT RESOLVED
7 that the City Council . . . hereby authorizes the City Manager
8 to negotiate and execute the First Amendment to the Cooperation
9 and Option Agreement with Russell City Energy Center-LLC
10 on file in the Office of the City Clerk, in a form approved by
11 the City Attorney.

12 (Exhibit 4, attached resolution.)

13 During the review period before the CEC of this November 2006 “amendment,” no where
14 does the City staff provide any analysis or criticism of mitigations, environmental or health
15 hazards, or anything other than “full support.” In response to CEC’s staff’s March 16, 2007
16 inquiry to the City staff concerning its inconsistency of “fully supporting” a 600 megawatt
17 fourteen story high thermal plant with a thermal plume of minimally 1,000 feet, but opposing a
18 seven story 115 megawatt plant, the City staff acknowledged the following:

19 **The Hayward General Plan [as amended in 2002] contains**
20 **discussion and policies that encourage the *transformation***
21 ***of the Industrial Corridor from a manufacturing and distribution***
22 ***emphasis to more research and development oriented businesses.***

23 (April 19, 2007 letter from David Rizk, Planning Manager to CEC Environmental Office Manager
24 Paul Richins: Exhibit 6 to Hargleroad.)

25 The only explanation for the City Council’s authorization to the City Manager to swap
26 land and enter into agreements was that by authorizing the land swap and execution of contracts
27 the Council must have “determine[d] that the new location was consistent with local land use
28 regulations.” (Exhibit 6, p. 5.) However, as to the second power plant proposed and presently
under CEC review called Eastshore, on March 13, 2007 the Council “adopted Resolution #07-028,
which declared the siting of the Eastshore project “to be inconsistent with the Hayward 2002

1 General Plan policies” and that the Eastshore plant was “inconsistent with the Hayward Industrial
2 Zoning District provisions (HMC S10-1.16000.)” (Paul C. Richins March 16, 2007 letter to David
3 Rizk, p. 2: Exhibit 5 to Hargleroad.) As CEC staff properly recognized,

4 **The original Russell City project site was not**
5 **evaluated under these provisions, but the new**
6 **site is subject to the requirements of the revised**
7 **document. *The Council did not address consistency***
8 ***of the new site with the 2002 General Plan or current***
9 ***Municipal Code as part of the 2005 resolution and***
10 ***did not amend the original site-specific #01-104***
11 ***resolution.***

12 (Exhibit 5, p. 2, emphasis and italics added.) Group petitioners agree.

13 Group petitioners submit that these exhibits establish that the City Council improperly
14 contracted away its legislative authority and that these “agreements” with the former applicant and
15 various Russell owners, and that the alleged “full support” by the City Council as to Russell, as a
16 matter of law are entitled to no weight whatsoever. Additionally, Group Petitioners agree that
17 Alameda County was never meaningfully solicited for its input nor was the public of either or both
18 jurisdictions provided an opportunity for meaningful public review by its numerous affected
19 communities with their respective elected representatives and staff.

20 **C. The Aviation Hazards Raised Over Blythe, The CEC’s Staff Investigation And The**
21 **New Information From The County Airport Commission Determining That A**
22 **“NOTAM” Is Not A Mitigation.**

23 Although this is information which the CEC is aware of, despite CEC staff’s opposition to
24 this project at least in part based on its aviation hazards, the CEC nevertheless determined that
25 “the RCEC will not be a hazard to aircraft, *even less so with the additional protective measure of a*
26 *notice to pilots to avoid overflight of its thermal plumes.* It will also comply with all LORS, . . . “

27 (Decision, p. 168.)

28 After the Decision, however, on October 17, 2007, the Alameda County Land Use Airport
Commission met and heard the application for a recommendation of the Eastshore Plant proposed

1 by the applicant Tierra. In recommending disapproval as to that location, a mere 1,000 feet from
2 Russell, the Commission struck the suggested "proposed mitigations of posting a notice to
3 airmen," which were adopted for Russell. The basis of the decision was that a "notice to airmen"
4 did not constitute mitigation for loss of airspace or utility to the Hayward Airport. (Declarations
5 of White and Cathey.)

6 Also not in the evidentiary record is the offered testimony of Gary Cathey, who appeared
7 before the Commission on September 26, 2007, but no party offered his opinion as testimony.
8 Group petitioners do so now as well as Jay White, counsel for California Pilots Association. As
9 their accompanying declarations reflect, they too agree with the Alameda Airport Commission's
10 opinion that a "notice to airmen" is not mitigation.
11

12 Additionally, in preparing for this declaration, Mr. Cathey discovered his December 18,
13 2003 field notes for his flyover of the Sutter Plant in Yuba County accompanied by CEC staff
14 member Eileen Allen. At the time of his appearance before the Alameda Airport Commission and
15 the CEC, Mr. Cathey did not have his field notes. They reflect that Mr. Cathey and Ms. Allen
16 with the CEC experienced extreme turbulence at 1,000 feet and that he had concluded that he
17 could descend no lower without experiencing loss of control and maneuverability. Contrary to the
18 representations made by the representatives of Russell before the Alameda Airport Commission,
19 the Sutter plant is not "the same" size, but smaller, 540 megawatts.
20

21 **D. The Doubling Of The Surrounding Population And Change In Land Use**
22 **Designations Rendering The Project Contrary And Inconsistent With The Local,**
Ordinances, And Regulations As Well As Section 25528.

23 According to the Hayward Area Recreational Park District's 2006 Master Plan, adopted in
24 June 2006, page 3:

25 . . . the **City of Hayward's population**, which represents the
26 majority of the District, **has grown by 25 percent in the last ten**
27 **years, at almost double the rate of both Alameda County and**
the Bay Area. This density is also represented in the unincorporated
28 **areas of the District with Cherryland (11,859/persons per square**

Memo of points and authorities of the District

Cec petition p & as.doc

1 **mile) and Ashland (11,284 /persons per square mile) ranking**
2 **respectively as the third and sixth most densely populated**
3 **areas of the Bay area.**

4 (Emphasis added.)

5 Also, as discussed by the letters exchanged between the City Planning Manager and CEC
6 staff, Exhibits 5 and 6, the City zoning changed in 2002 and there exists no determination by
7 either the City or County concerning whether the Russell site is consistent with the local
8 ordinances or regulations. Based on the alleged “mitigation” adopted of posting a NOTAM for
9 the one thousand plus high thermal plume, the noise abatement ordinances to prohibit aircraft over
10 residential neighborhoods will likely be violated in order to obey the NOTAM.

11 Moreover, although the cities of Berkeley and Piedmont may enjoy the benefits of the
12 partial subsidy for the highly questionable fire retrofit program, the unincorporated districts of
13 Cherryland and Ashland, virtually next door and densely populated, are completely omitted. (See
14 accompanying declaration of Michael Toth.) Nor is there any discussion concerning the
15 applicability of section 25528, which requires that the “applicant acquire, by grant or contract, the
16 right to prohibit development of privately owned lands in the area of the proposed site which will
17 result in population densities in excess of the maximum population densities which the
18 commission determines . . . are necessary to protect public health and safety.” In this regard, also
19 ignored is the impact on the close by regional Bay shorelands, Bay Trail, and the Cargill wetlands
20 restoration program.

21
22 **E. The September 27, 2007 Bankruptcy Filing By Calpine In New York After This**
23 **Decision Disclosing There Is No Need For This Project And That The Equipment**
24 **Allegedly Held For This Project As Represented To CEC Staff Is Sold.**

25 Nowhere does the alleged “amendment” address whether this project is needed, as required
26 when there is nonconformance with the local ordinances and regulations. (Pub. Resource Code,
27 Sec. 25525.) However, the day after the effective day of this Decision, September 27, 2007,
28 Calpine, a majority owner of this project, together with the other debtors, filed with the U.S.

1 Bankruptcy Court a fourth amended disclosure statement. (Exhibit 7 to Hargleroad.) The
2 disclosure made after this Commission's Decision, reflects substantial changed circumstances:

3
4 By 2001, Calpine had developed or acquired a portfolio
5 of nearly 10,000 MW of clean and reliable power plants
6 in North America and was undergoing further expansion
7 through both construction and acquisitions. **Between 2001
and 2004, this expansion effort led Calpine to more than
double its *installed* power generation capacity. By December
2006, Calpine owned 24,839 MW of *operating* generation capacity . . .**

8 (Disclosure, p. 57, Exhibit 7 emphasis and italics added.)

9 Additionally, Calpine represents to the federal court in New York, concerning the West:

10 . . . **Between 2000 and 2003, more than 175,000 MW of
11 new generating capacity came "on line" in the United States.
12 *In most regions, these new capacity additions far outpaced
the growth of demand, resulting in "overbuild" markets, i.e.,
13 markets with excess capacity. In the West, for example,
approximately 24,000 MW of new generation capacity was
14 added between 2000 and 2003, while demand only increased
by approximately 8,000 MW.***

15
16
17 This surge of generation investment has subsided since 2003.
18 During 2005, for example, only 17,000 MW of new supply was
19 added nationwide. . . . **Currently, supply exceeds demand in most
regional markets.**

20 (Disclosure, p. 21, Exhibit 7, emphasis and italics added.) According to the CEC's on records
21 provided on line, there are some twenty plants already approved which have not been built and
22 continue pending.

23 Additionally, this project does not use the best available technology as observed by the
24 CEC staff who have suggested, "**Staff notes that the El Segundo Power Redevelopment
25 Project (00-AFC-14), in order to meet changing electricity market demands, just filed a
26 major amendment (June 15, 2007) redesigning their project from a "traditional" combined cycle
27 to a Rapid Response Combined Cycle that will use Siemens combustion turbines (replacing the
28 previously approved GE CTCs) and Benson once-through boilers.**" Additionally, "The project

1 owner claims that redesign of the project with Fast-Start technology would **involve significant**
2 **costs as they have purchased some equipment** and designed the project and systems. These cost
3 increases and redesign may require extensive renegotiations with their financing entities.”⁵

4 Group petitioners bring to the CEC’s attention the following information disclosed the day
5 after the September 26, 2007 hearing:

6 c. Turbine and Industrial Equipment Sales

7 (i) *GE Model PG7241 FA 60 Hz Turbine*. The Debtors
8 sold this single surplus turbine, along with certain related equipment, to
9 Invenergy Thermal LLC, the stalking horse bidder, for approximately
10 \$16 million on October 17, 2006 after no other bidders were qualified
11 to participate in a Bankruptcy Court-approved auction.

12 (ii) **SPG 501F Turbines**. The Debtors sold four surplus
13 **Siemens Power Generation Model 501FD2** Econopac combustion
14 turbines, along with certain intellectual property rights, equipment
15 and materials related thereto, to Consorcio Pacific Rim Energy

16 ⁵ The basis for this recommendation was the following:

17 Staff believes that the Siemens-Westinghouse Fast-Start
18 technology is an alternative technology that would mitigate
19 the project impacts to the environment; Staff therefore
20 recommends that, unless the project owner accepts conditions
21 that restrict the start-up duration and emissions, the RCEC
22 should be built employing the Fast-Start technology or its
23 equivalent to reduce the start-up and shutdown event emissions.
24 Staff’s recommendation is incorporated into Condition of
25 Certification **AQ-SC7** through **-SC10**.

26 Alternatively, the 600 MW combined cycle Palomar Project
27 in Escondido has installed a proprietary control system, OpFlex from
28 General Electric, which allows ammonia to be injected at the
earliest time to shorten start-up times and reduce start-up emissions
at the facility. Preliminary, non-optimized results from their March 7, 2007,
Petition for Variance 4703 Extension indicated that they have
reduced NOx emissions from 120 lbs to 28 lbs for hot or warm
start-up events. Staff provided a comment on May 29, 2007, to
the District on the PDOC for RCEC that the District consider
hardware and software modifications to the project to shorten
startup times and significantly reduce start-up emission as BACT.

(Staff Report ____.)

Memo of points and augth CEC 01-AFC-7C

Cec petition p & as.doc

1 Yucal Placer HTE (“Pacific Rim”). After marketing the turbines,
2 the Debtors executed an asset purchase agreement with Pacific Rim
3 on October 13, 2006 to sell the turbines for approximately **\$48 million**.
4 After no higher or better offers for the turbines were received
5 in a Bankruptcy Court- approved auction, the sale to Pacific
6 Rim was approved by the Bankruptcy Court, and subsequently
7 consummated, on November 15, 2006.

8 (Exhibit 7, emphasis and italics added.) Group petitioners note that this “amendment” petition
9 was filed just a few weeks later with the CEC in November 2006. Whether this is the “same”
10 equipment, at this point Group petitioners do not have sufficient information, but raise this issue
11 as new information requiring reconsideration and an investigation as to whether certification should
12 be revoked.

13 ARGUMENT

14 **A. Entitlement To Intervene For The Purpose Of Reopening The Administrative And 15 Evidentiary Records And For Reconsideration Of Material Omissions In The Final 16 Decision And To Consider New Evidence.**

17 Group petitioners submit their petition to intervene to become a party to achieve standing
18 to petition for reconsideration. Group petitioners offer the declarations of Michael Toth, Jay
19 White, Gary Cathey, Tom Kerston, Sherman Lewis, Andrew Wilson III and Jewell Hargleroad in
20 support of their offer of proof. In submitting this, Group petitioners reserve the right to
21 supplement any offer of proof.

22 Further, Group petitioners request that the administrative and evidentiary records be
23 reopened to accept their proffered evidence and any and all other evidence that was presented to
24 the CEC but excluded because it was not offered subject to the Rules of Evidence and offered by a
25 party.

1 **B. The CEC's Representation That CEQA Proceedings Are Followed When They Are**
2 **Not And Representations That Russell Was "Approved" And Nothing Could Be**
3 **Done.**

4 Unlike the first public notice posted on the docket for the 2001/2002 proceedings, the
5 "Notice of Public Informational Hearing And Site Visit" dated November 29, 2006, affirmatively
6 represented the following:⁶

7 **The power plant licensing process, which incorporates**
8 **requirements equivalent to the California Environmental**
9 **Quality Act** considers all relevant engineering and environmental
10 aspects of the proposed project. The amendment process
11 provides a public forum allowing the Applicant, Commission staff,
governmental agencies, adjacent landowners, and members of
the general public to consider the advantages or disadvantage *of the*
modifications, . . .

12 (Page 2 under "Purpose of the Informational Hearing.") The first sentence of this notice provides:

13 " On November 17, 2006, Russell City Energy Company, LLC ("Applicant"), filed a petition to
14 *modify the California Energy Commission's decision approving the Russell City Energy Center*
15 *Project.*" (Page 1, italics added.) Under Background, the notice provides "On November 17,
16 2006, the Energy Commission began its *review of the proposed modifications to the Russell City*
17 *Energy Center which was originally approved* on September 11, 2002."

18
19 By failing to properly process this application as an application for a new project, the
20 public was misled into believing "there is nothing that can be done." (See declaration of Michael
21 Toth.) That was fundamentally incorrect. Likewise, these proceedings are far from CEQA. This
22 representation caused Group petitioners delay in obtaining counsel since under CEQA they do not
23 have to satisfy the hearsay provisions of the Evidence Code and evidence offered is not limited to
24 only that offered by officially recognized "parties."

25
26 ⁶ To date CEC staff has failed to identify where these notices were published despite several
27 public requests.

1 **C. As A Matter Of Law, The Amendment Proceedings Must Be Set Aside To Treat This**
2 **Application As A New Project, The Public Health And Environmental Hazards**
3 **Reviewed With The Local Jurisdictions To Be Assured They Are Mitigated, And**
4 **“Need” Must Be Examined, Including In Light Of AB 32.**

5 As a matter of law, the Commission must reconsider this “amendment” to this
6 certification. The record unambiguously establishes that:

- 7 1. The Project has not been reviewed or approved by the local jurisdictions and is not in
8 conformance with the local or regional laws, standards, or ordinances.
- 9 2. The County was not notified of any intent to build a 600-megawatt thermal power plant
10 with a 1000-foot high thermal plume in its Mount Eden unincorporated or redevelopment
11 jurisdiction.
- 12 3. The Project is not mitigated.
- 13 4. New information has been revealed that restriction of airspace is not a mitigation and there
14 are material misassumptions concerning a pilot’s ability to safely land, among the other
15 information presented.
- 16 5. The methodology in calculating air emissions and mitigations is fatally flawed and as a
17 matter of law must be reconsidered to apply the proper and current known methodology.
- 18 6. The Project will clearly have a significant detrimental effect on the environment **and the**
19 **“No Build Finding” is unsupported by any evidence.**

20 Additionally, any attempt to overcome this non-conformance must still satisfy section
21 25523. Also, in light of the passage last year of AB 32, section 25500.5 becomes particularly
22 relevant. This requires the Commission to certify sites “which are required to provide a supply of
23 electric power sufficient to accommodate the demand projected in the most recent forecast of
24 statewide and service area electric power demands adopted pursuant to subdivision (b) of Section
25 25309.” As admitted by Calpine’s filing the day after this Commission’s hearing, there already
26 exists more supply than demand.

27 Since 2001, in addition to AB 32, substantial changes in the law also have been enacted
28 which should equally apply. As Calpine’s bankruptcy filing acknowledges:

Carbon (greenhouse gas) regulations. Carbon regulations
are still pending in the United States and may come into
effect in the Northeast in 2009 and California in 2012. The
United States Supreme Court recently issued a decision

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holding that the Federal Clear Air Act of 1970 requires the Environmental Protection Agency to regulate greenhouse gases from new motor vehicle once it concludes that such emissions contribute to climate change. **Calpine believes the Supreme Court's ruling could effectively determine the Environmental Protection Agency's authority to regulate air pollution associated with climate change from all sources, including power plants.**

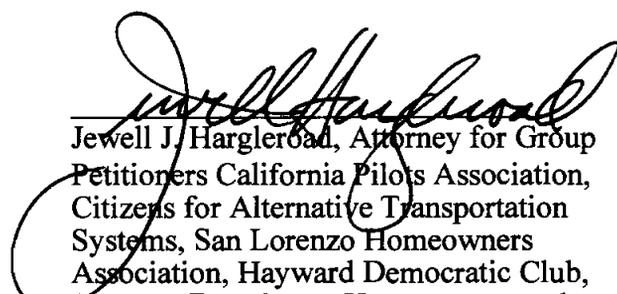
Under these circumstances based on the record before this Commission, as a matter of law, Group petitioners and the County are entitled to reconsideration, or alternatively, certification must be revoked.

CONCLUSION

Group petitioners urge the Commission to grant their petition to intervene, reopen the administrative and evidentiary records, to either reconsider or revoke this improper September 26, 2007 certification of this new project.

Dated: October 25, 2007

Respectfully Submitted,


Jewell J. Hargleroad, Attorney for Group
Petitioners California Pilots Association,
Citizens for Alternative Transportation
Systems, San Lorenzo Homeowners
Association, Hayward Democratic Club,
Skywest Townhouse Homeowners and
Hayward Area Planning Association