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01-AFC-7C
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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the Application for Certification of	)	
the Russell City Energy Center Project	)	
	)	
	)	

OPPOSITION TO THE PETITIONS FOR RECONSIDERATION OF THE COUNTY OF ALAMEDA, THE CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT AND THE GROUP PETITIONERS

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Russell City Energy Company LLC ("Project Owner') respectfully submits this Opposition to the Petitions for Reconsideration submitted by Alameda County ("County")[1], the Chabot-Las Positas Community College District ("Chabot")[2] and the Group Petitioners.[3] We address in a separate pleading the Petitions to Intervene that were concurrently filed with the Petitions for Reconsideration.

As set forth below, the Petitions for Reconsideration must be denied. The Petitions fail to satisfy the Commission's requirement for consideration or granting of a Petition for Reconsideration. First, as a result of their own knowing inaction, none of the Petitioners are a

[1] Alameda County's Petition for Reconsideration is captioned as "Petition for: (1) Reopening of Administrative Proceedings; (2) Reopening of the Evidentiary Record; (3) Reconsideration of Energy Commission Decision; and (4) Request for Stay." ("County Petition')

[2] Chabot's Petition for Reconsideration is captioned as "Chabot-Las Positas Community College District's Petition: (1) To Reopen the Administrative Proceedings; (2) To Reopen the Evidentiary Record; (3) For Reconsideration of Energy Commission Decision; and (4) For Stay of Final Decision." ("Chabot Petition')

[3] Group Intervenors' Petition for Reconsideration is captioned as "Group Petitioners' Petition to Intervene as a Group to Reopen the Administrative Proceedings, Reopen the Evidentiary Record and for Reconsideration, and Petition for Financial Hardship" ("Group Petition'). In addition, the Group Petitioners' Memorandum in Support of the Petition also includes in the caption, "Request for Stay of Complaince ([sic] Proceeding", although this is not included in the Petition.

party to the proceeding. Because none of the Petitioners are a party to the proceeding, the Commission does not have the discretion to consider these Petitions. Second, even if the Commission had the legal authority to consider the requests of these non-parties, the Petitions fail to cite new evidence or legal error that would warrant reopening of the proceeding. To the extent that these Petitions purport to offer "new information" or allege errors of fact or law in the Commissions Final Decision on the Amendment, they fail to explain why this information could not have been raised in the proceeding. Instead, the Petitions attempt to raise the false impression that the Petitioners were not adequately informed of the Amendment proceeding,[4] when, in fact the Petitioners had actual knowledge of the Russell City Energy Center ("RCEC") project and the Amendment proceeding.

The Petitioners' principal allegation of legal error and the primary rationale for reconsideration is the assertion that the County of Alameda was not "adequately" notified of the proceeding.[5] As a result of this alleged defect in notice, the County variously asserts that it only recently became aware of the project,[6] that it was misled into believing the project was only in the City of Hayward,[7] and that it was denied a fair opportunity to participate.[8] In sum, the County contends that it was "prevented" from participating because the Commission did not tell it about the proceeding and give it enough time to prepare.[9]

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[4] Memorandum of Points and Authorities in Support of County's Petition, ("County Memorandum"), p. 4, lines 13-17; Memorandum of Points and Authorities in Support of Chabot's Petition, ("Chabot Memorandum"), p. 6, lines 5-15.

[5] *Id.*

[6] County Memorandum, p. 8, lines 10-13

[7] Id. at pp. 5-6

[8] Id. at p. 12, lines 4-6

[9] *Id.* at p.8, lines 12-20.

All of these assertions are simply untrue. As we explain below, the Alameda County Board of Supervisors and Mr. Sorenson (as Director of the Redevelopment Agency and Community Development Agency) were aware of the proceeding from the outset of the case, they were aware that the project was partially located on parcels within the unincorporated area of the County that were to be annexed to the City of Hayward, and they had detailed knowledge about the nature, location and cost of the proposed facilities. All of this information was contained in a draft Annexation Agreement between the County and the City of Hayward that Mr. Sorenson transmitted to the Board of Supervisors on December 4, 2006 and that the Board reviewed and approved on December 19, 2006.[10]

The record clearly demonstrates that the County, Chabot and Group Petitioners all had actual knowledge of the RCEC proceeding and the Amendment proceeding and they all had ample opportunity to present the information and concerns set forth in these Petitions to the Commission in the evidentiary hearings while the Amendment proceeding was open. In light of the overwhelming evidence of what the Petitioners knew and when they knew it, the Petitions for Reconsideration must be denied.

I. BACKGROUND

The RCEC project has been thoroughly reviewed and approved by the Commission twice over the past six years – once in 2002 and again in 2007. Please refer to Section I of the Project Owner's Opposition to the Petitions to Intervene, incorporated herein by this reference, for a description of the background to the Petitions to Intervene and the Petitions for Reconsideration.

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[10] See Section II.B.3.a.2 of this Opposition, infra

II. THE PETITIONS FOR RECONSIDERATION SHOULD BE DENIED.

A. As a Result of Their Own Knowing Inaction, the Petitioners are not a party to the Proceeding.

Section 1720(a) of the Commission's rules states that "Within 30 days after a decision or order is final, the Commission may on its own motion order, or any party may petition for, reconsideration thereof."[11]

None of the Petitioners are a party to the proceeding. They concede this.[12] The County further concedes that the Final Order on the Amendment was final and effective on September 26, 2007.[13] Therefore, parties had until October 26, 2007 to Petition for Reconsideration. Because each of the Petitioners is not a Party as a result of its own knowing inaction (as discussed in the following sections regarding noticing and the Petitioners having had actual notice of these proceedings), each is without standing to file a Petition for Reconsideration. Therefore, the Commission is without discretion to entertain these Petitions.

The Petitioners have also filed untimely Petitions for Intervention. We explain in our Opposition to these Petitions to Intervene why these Petitions for Intervention also must be summarily denied. However, it is immaterial whether the Petitions to Intervene have merit or whether these Petitioners might become parties at some future date to some future proceeding. Section 1720(a) expressly authorizes only parties or the Commission to file a Petition for

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[11] Section 1720(a) reads, in part: "Within 30 days after a decision or order is final, the Commission may on its own motion order, or any party may petition for, reconsideration thereof. A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision...."

[12] County Memorandum, p. 2, line 7; Chabot Memoranda, p.2, line 13; Group Petition, p.2

[13] County Memoranda, p.2, lines 12-18

Reconsideration. The rule does not authorize a person who is not a party to file a Petition for Reconsideration.

Once the Commission has determined that no party (or the Commission on its own motion) has filed a Petition for Reconsideration within 30 days after the decision on the Amendment was final, any Petitions by non-parties must be summarily denied.

B. Even if the Petitioners had been a party to the proceeding, their Petitions for Reconsideration are without merit.

Section 1720(a) further provides that "A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision."

As we explain below, the Petitions for Reconsideration do not satisfy any of these requirements.

1. The County and Chabot have failed to cite any new evidence that despite the diligence of the County and Chabot could not have been produced during the evidentiary hearings.

Section 1720(a) provides that a petition for reconsideration must specifically set forth either (1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case or (2) an error in fact or change or error of law. Where either new information or errors are alleged, the Petitioners must explain fully why the alleged matters could not have been presented during the evidentiary hearings.

The Petitions of the County and Chabot fail to specifically set forth any new evidence that despite the Petitioners' diligence could not have been produced in the evidentiary hearings. At least one County agency – the Airport Land Use Commission – submitted substantial

evidence during the hearings.[14] Moreover, at the County's request, the Commission extended the date for closing the evidentiary record to accommodate the production of this evidence. Chabot's and the County's Petitions do not specifically set forth any new evidence that could not have been similarly produced, had the County chosen to do so.

2. The Group Petitioners have failed to cite any new evidence that despite the diligence of the Group Petitioners could not have been produced during the evidentiary hearings.

The Group Petitioners cite three instances of "new information requiring reconsideration".[15] However, this alleged new information is not new evidence. It is instead, either new arguments regarding the evidence that the Commission has already exhaustively considered, allegations regarding the record of other administrative agencies or misstatements of the record.

First, the Group Petitioners argue that a "NOTAM is not a mitigation."[16] This is not new evidence. It is an old argument. The question of whether to require a NOTAM at the Hayward Executive Airport was extensively reviewed by the Commission. The Commission allowed all interested persons the opportunity to participate on these issues in workshops, to comment on the Staff Assessment, address the Committee fully regarding these issues without time limitations, to comment on the proposed decision and to address the full Commission during two hearings. The Commission extended the proceeding not once, but twice[17], to take further evidence on these

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[14] See Exhibit 107: Alameda County Airport Land Use Policy Plan, dated July 16, 1986. Sponsored by Staff and received into evidence on July 19, 2007.

See Exhibit 108: Alameda County Airport Land Use Commission Resolution 01-2007 dated August 16, 2007. Sponsored by Staff and received into evidence on September 5, 2007.

[15] Memorandum of Points and Authorities in Support of Group Petition,("Group Memorandum"), pp. 2, 15, 17

[16] Id. at 2.

[17] Evidentiary Hearing, July 19, 2007, Tr. 277, lines 10-14; Business Meeting, September 12, 2007, Tr. 54-55.

issues. All of the arguments regarding NOTAMs offered by the Group Petitioners either were made during the proceeding, or could have been made through due diligence of the Group Petitioners.

The second piece of alleged "new information" offered by Group Petitioners is the hearsay allegation of statements made regarding the Sutter Power Plant before the Alameda County Airport Land Use Commission ("ALUC").[18] This allegation indicates that the Group Petitioners do not understand the allowable grounds for a Petition for Reconsideration. To seek reconsideration of a Commission decision, the Petition must allege errors in the Energy Commission's final decision or in the Energy Commission's evidentiary record. Hearsay allegations of what may have been said before other administrative tribunals are simply irrelevant to a Petition for Reconsideration of the Energy Commission's Final Decision. Moreover, if ALUC proceedings in August were relevant to the Energy Commission's decision, the Group Petitioners have failed to explain fully why these concerns were not raised in a timely manner before the Energy Commission.

The third piece of alleged "new information" offered by the Group Petitioners is the false speculation that some equipment sold by Calpine in 2006 may be the same equipment that Calpine plans to use in the proposed project.[19] Group Petitioners do not have any information to support this speculation,[20] but nevertheless offer it as the basis for their Petition.

Group Petitioners refer to a fourth amended disclosure statement filed by Calpine in U.S. Bankruptcy Court on September 27, 2007. The filing notes that Calpine sold one surplus GE turbine and four surplus Siemen's turbines in October 2006. Contrary to the inference raised by

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[18] *Id.*

[19] *Id.* at 14-15

[20] *Id.* at 15, line 8

the Group Petitioners, the Project Owner is Russell City Energy Company, LLC, not Calpine. As explained in the Commission's Final Decision on Amendment #1, the Project Owner will use 2 Siemens-Westinghouse combustion turbines.[21] While Calpine may have sold some turbines, the Project Owner continues to own the turbines that will be used in the RCEC project.[22] Russell City Energy Company is a non-debtor and is not a party to the Calpine Corporation bankruptcy proceedings.[23]

Therefore, the speculation by the Group Petitioners that the RCEC turbines have been sold is untrue and not cause for reconsidering the Decision approving the Amendment.

3. The Petitioners have failed to show legal error.

a. The County has not shown legal error.

The County's Petition alleges four legal errors. As we describe below, each of the four allegations is entirely without merit.

1) The Commission's Notice to the County was adequate.

Citing Section 1714(c) of the Commission's regulations, the County alleges that the Commission's Notice to the County was inadequate.[24] The County concedes that the Commission provided written notice and Request for Agency Participation to numerous County agencies including the Alameda County Public Works Agency, Alameda County Department of Agriculture, Alameda County Department of Public Health, Alameda County Hazardous Materials Team, Alameda County Assessor, Alameda County Auditor, Alameda County Sherriff

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[21] Final Decision on the Russell City Energy Center Amendment #1, September 26, 2007, p. 10: "The amended project will continue to include two Siemens Westinghouse "Fclass" combustion turbine generators (CTGs) equipped with dry, low oxides of nitrogen (NOx) combustors and steam injection capability…"

[22] See Declaration of Michael Argentine, attached to this Opposition as Exhibit A.

[23] *Id.*

[24] County Memorandum, p. 4, lines 13-16

and the Mosquito Abatement District.[25] However, the County alleges that the Commission committed legal error because the following entities did not receive "adequate" notice: the Alameda County Airport Land Use Commission, Alameda County Board of Supervisors, Community Development Agency, Redevelopment Agency and Planning Department.[26]

This allegation of legal error fails for three reasons. First, the Commission was not required to provide notice of the Amendment under Section 1714(c). The County asserts that "Section 1714(c) obligates the Commission to provide notice to local agencies that would have had jurisdiction "but for the Commission's jurisdiction to certify sites." However, Section 1714(c) is not applicable to this proceeding. Section 1714(c) requires the Executive Director to transmit a copy of "the notice or application" to specified agencies and to request analyses and comments thereon. The instant proceeding does not involve the submission of a notice of intent or application for certification. Instead, the current proceeding involves an amendment to a permit – specifically, a petition for modification filed pursuant to Section 1769. Therefore, section 1714(c) is simply not applicable to this Amendment.

Second, even if Section 1714(c) had been applicable to this Amendment, the Commission more than satisfied the requirements of this rule. Following receipt of the Petition for Modification in November 2006, the Commission provided extensive notice to the public and other interested agencies, including numerous Alameda County agencies.[27]

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[25] County Memorandum, p. 4

[26] *Id.*

[27] Transcript of Commission Business Meeting, September 26, 2007; Tr. 69-71

There are dozens of different agencies, departments, commissions and subdivisions in Alameda County.[28] The Commission cannot reasonably be expected, nor is it required, to provide written notice to all of them. The Commission did provide initial written notice to those entities within Alameda County that had expressed an interest in this project and the Commission could have reasonably relied on these agencies sharing the notice with the Board of Supervisors and other interested agencies within the County.

However, the Commission's notice to Alameda County did not end with the issuance of the Request for Participation. In addition to this Request, the Commission provided direct, personal notice to the Airport Land Use Commission, Community Development Agency, Redevelopment Agency and Planning Department in a meeting between Commission Staff and a Senior Planner in the Planning Department of the Community Development Agency of Alameda County.[29]

On February 6, 2007, Cindy Horvath, the Senior Transportation Planner in the Planning Department of the Alameda County Community Development Agency met in person with five Commission staff members to discuss the Russell City project.[30] The meeting began with a description of the Commission siting process "including the opportunities for public involvement, publication of draft documents and responding to public comments or issues raised during the process."[31] This meeting was followed by other communications during the first six months of 2007 between Commission staff and the County representative.

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[28] Alameda County's Official Website lists 48 Department and Agencies of the County. The ALUC is not on this list. http://www.acgov.org/departments.htm

[29] Report of Conversation, Prepared by James Adams, February 9, 2007, 01-AFC-7c, Log #39238; Set forth as Exhibit A to the Project Owner's Opposition to the Petitions to Intervene.

[30] *Id.*

[31] *Id.*

In addition to serving as Staff to the Alameda County Airport Land Use Commission, Ms. Horvath also holds the title of Senior Transportation Planner in the Planning Department of the Alameda County Development Agency[32] and she serves as principal Alameda County Contact for the Eden Area General Plan.[33] The record of conversation reflects that the Commission staff agreed to provide a copy of the Amendment to those participants at the meeting that requested this information.[34] Therefore, this meeting further satisfied the requirements of Section 1714(c) (if applicable) that the Executive Director transmit to interested agencies a copy of the Amendment and request comments thereon. The February 6, 2007 meeting occurred more than 5 months before the July 19, 2007 evidentiary hearing in this proceeding, which provided the County ample notice and time to participate, if it chose to do so, on any relevant issue.

The County may argue that when Ms. Horvath attended the February 6, 2007 meeting she was attending only in her capacity as Staff to the Airport Land Use Commission and not in her capacity as Senior Transportation Planner in the Planning Department of the Community Development Agency. In other words, the County may argue that she was wearing only one hat at the meeting and not her other hats or that she was listening with only her ALUC ear and not her Community Development Agency ear. Of course, such an argument would be preposterous. Throughout the proceeding, Ms. Horvath represented herself as wearing various hats, including Senior Transportation Planner of the Community Development Agency.[35]

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[32] Transcript of Evidentiary Hearing, Tr. 232

[33] http://www.edenplan.net/

[34] Report of Conversation, Prepared by James Adams, February 9, 2007, 01-AFC-7c, Log #39238; Set forth as Exhibit A to the Project Owner's Opposition to the Petitions to Intervene.

[35] For example, when Ms. Horvath appeared at the RCEC evidentiary hearing, she stated: "Good evening. My name is Cindy Horvath, and I'll spell that for you. It's H-o-r-v-, as in Vickie, -a-t-h. I'm the Senior Transportation Planner

Therefore, the Commission's initial Request for Participation together with subsequent and repeated meetings and communications with staff of the Alameda County Community Development Agency fully satisfied the notice requirements of Section 1714(c) (if applicable).

2) The County had actual knowledge of the proceeding.

Assuming solely for the sake of argument that the Commission failed to provide a particular entity within Alameda County with a copy of the Amendment or a request for comments, such a failure is immaterial because these entities had actual knowledge of the Amendment proceeding.

The County Petition alleges that five entities did not have "adequate notice" of the Amendment proceeding. However, the public record clearly demonstrates that each of these entities had actual, substantial and timely knowledge of the proceeding.

The Alameda County Airport Land Use Commission is one of the agencies that the County claims did not have "adequate" notice of the proceeding.[36] This assertion is false. As explained above, early in the proceeding the Commission Staff met personally with the Staff of the ALUC.[37] This meeting was followed with a letter of March 16, 2007, requesting comments on land use issues relating to the RCEC project. The ALUC received a copy of this letter.[38] Thereafter, on July 5, 2007, the Commission Staff personally transmitted a copy of the Staff Assessment and a request for agency input to: Cindy Horvath, Alex Amoroso, Community Development Agency Alameda County, 224 W. Winton Ave., Room 111, Hayward, CA

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for Alameda County Community Development Agency. And one of the hats I wear is staff to the Airport Land Use Commission, the Alameda County Land Use Commission." (Tr. 352, lines 13-20)

[36] County Memoranda, p. 4

[37] See Section II.B.3.a.2 of this Opposition, above.

[38] Letter from James Adams to Cindy Horvath, dated July 5, 2007; 01- AFC-7C, Docket Log # 41415

94544.[39] In addition to these written communications, both the Staff and the Project Owner attended two meetings of the ALUC in July and August 2007 and provided extensive written material to the ALUC.

When the Commission held the evidentiary hearing on July 19, 2007, County Staff participated in the hearing.[40] Moreover, the County Staff informed the Commission that the ALUC was still reviewing the issue and requested that the Commission "postpone a decision on that Russell City Energy Center amendment until the Airport Land Use Commission has made a determination on this project."[41]

The Commission did not "ignore the County's concerns" as the County's Petition alleges. Instead, the Commission granted the request from the County Staff to keep the evidentiary record open on aviation issues.[42] The recommendations of the ALUC were thereafter received into evidence.[43]

Based on the foregoing facts, it is a serious misrepresentation for the County's Petition to state that the ALUC did not have adequate notice of the proceeding or adequate opportunity to participate. The Commission made every possible effort to accommodate the ALUC and accepted all of the evidence proffered by the County on this issue. The Commission even extended the closure of the evidentiary record to accommodate additional evidence from the ALUC.[44]

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[39] *Id.*; See Exhibit A to the Declaration of James Sorensen.

[40] Transcript of Evidentiary Hearing, Tr. 232

[41] *Id.* at 236, lines 16-20

[42] *Id.* at 277

[43] See Exhibit 108

[44] Transcript of Evidentiary Hearing, July 19, 2007, Tr. 277

The County's Petition further alleges that the Board of Supervisors, County Development Agency, Planning Department and Redevelopment Agency did not have "adequate notice".[45] These allegations are also fallacious. The public record clearly demonstrates that all of these entities had substantial, actual and early knowledge of the RCEC amendment proceeding. As explained above, the Planning Department and Community Development Agency had actual knowledge of the proceeding through the Commission's extensive communications with Ms. Horvath. It is significant to note that the address to which these communications to Ms. Horvath were delivered, is the same address and same room number that Mr. Sorenson requested notices be sent.[46]

In addition, it is clear that Mr. Sorenson himself (as Executive Director of the Redevelopment Agency and as Director of the Community Development Agency) and the Board of Supervisors had substantial knowledge of the Amendment proceeding and were fully aware of the RCEC project in its revised location. In two memoranda addressed to the Board of Supervisors, dated December 4, 2006, Mr. Sorenson, acting as Executive Director of the Redevelopment Agency, recommended approval of the Mt. Eden Annexation and Public Approval Agreement.[47] Each of Mr. Sorenson's memoranda reported to the Board that "after completion of the Phase 2 annexation and the confirmation of tax increment from the proposed

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[45] County Memorandum, p. 4

[46] See footnote 39 and accompanying text.

[47] Letter from James E Sorenson, Executive Director, Alameda County Redevelopment Agency to the Alameda County Board of Supervisors, re Agenda Item No. 26 – Mt. Eden Annexation and Public Improvement Agreement, dated December 4, 2006. The letter recommends authorizing the President of the Board to execute the attached Annexation and Public Improvement Agreement between the Alameda Redevelopment Agency, the County of Alameda and the City of Hayward. The letter lists as one of the considerations *for* the annexation was that after completion of the Phase 2 annexation and confirmation of tax increment "from the proposed Calpine power plant, the RDA will reimburse the City of Hayward up to $190 million for construction of the Whitesell Drive extension." Exhibit C to the Project Owner's Opposition to the Petitions to Intervene.

power plant, the RDA will reimburse the City of Hayward up to $10 million for construction of the Whitesell Drive extension." [48]

The Agreement referenced in Mr. Sorenson's memoranda contains an Article exclusively devoted to the Russell City Power Plant. That Article begins by reciting:

> Section 4.1 Power Plant Development. *The Power Plant Developer has submitted an application to and is seeking the necessary approvals from the California Energy Commission to develop the Power Plant on the Power Plant Site. The Power Plant Site is located partly within the Depot Road area of the Mt. Eden Sub-Area (the "Mt. Eden Sub-Area Portion"), and partly within the current boundaries of the City (the "Current City Portion").* If developed, the Power Plant is estimated to generate approximately Eighty Million Dollars ($80,000,000) of increased property value at completion with respect to the Mt. Eden Sub-Area Portion of the Power Plant Site, and an additional approximately Three Hundred Twenty Million ($320,000,000) of increased property value at completion with respect to the Current City Portion of the Power Plant Site. It is the mutual objective of the Parties (the "Power Plant Property Tax Objective") that the increase in property value in connection with any development of the Power Plant on the Power Plant Site will be assessed and taxed."[49] (Emphasis added)

The Board of Supervisors reviewed and twice approved this Agreement on December 19, 2006, sitting first and the Board of Supervisors of Alameda County and then sitting as the Board of Directors of the Alameda County Redevelopment Agency.[50] In light of the Annexation Agreement prepared by the Redevelopment Agency and approved by the Board of Supervisors, the assertion in the Petition to Intervene that the Commission was "leaving the County out of the RCEC amendment proceedings" is simply untrue. As the Agreement clearly demonstrates, the

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[48] *Id.*

[49] Mt. Eden Redevelopment Sub-Area Annexation and Public Improvement Agreement, By and Among City of Hayward, County of Alameda and Redevelopment Agency of the County of Alameda, dated December 19, 2006, pp 17-18, Set forth as Exhibit B the Project Owner's Opposition to the Petitions to Intervene.

[50] Summary Action Minutes, Alameda County Board of Supervisors, December 19, 2006, items 26 and 27. Exhibit E to the Project Owner's Opposition to the Petitions to Intervene.

County was very much aware of the proceeding from its inception. The County was also sufficiently aware of the RCEC project details so as to be able to calculate the projected tax revenues that would accrue from the facilities to be placed on individual parcels inside and outside the unincorporated areas of Alameda County. In sum, the County was fully aware of the proceeding, fully aware of the project details and already making plans on how to assess, tax and divide the resulting revenues from the project. The County was fully aware of this Amendment proceeding and already planning to collect the revenues from the completed project.

If the County chose not to participate more actively in this proceeding, it is not because it was unaware of the proceeding or that it did not receive a written notice from the Commission, nor was it because it was under the mistaken impression that the project was located in the City of Hayward. The only logical conclusion that can be drawn from the County's active participation on some issues and its forbearance on other issues, is that the County chose to limit its participation to aviation matters.

3) The Commission's Notice to the County was not misleading.

The County alleges that the "Commission's Notice to the County was Misleading,"[51] because some County Staff might read the notice to mean that the RCEC project was located at the time the Amendment was filed, exclusively in the City of Hayward.

For the County's petition to suggest that County staff were misled to believe that the RCEC project was located (at the time the Amendment was filed) exclusively in the City of Hayward is a very serious misrepresentation in light of the Annexation Agreement that Mr. Sorenson himself forwarded to the Board of Supervisors. In December 2006, the County was

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[51] County Memorandum, p. 5, line 21. It should be noted that this argument expressly concedes that the Request for Participation sent to seven County agencies constituted "Notice to the County."

very well aware of where the proposed project was located and was already making plans on how to assess and divide the revenues from the project.

There was nothing misleading in the statement that the Russell City Project will be located in the City of Hayward. The annexation process that brought certain site parcels into the City of Hayward was undertaken with the full knowledge and support of the County.[52] Moreover, the Request for Participation accurately described the location of the project.[53] From this description, the County knew or should have known that a portion of this site was the subject of the proposed annexation. Finally, each notice included a CD containing the RCEC Amendment that fully described the site and the annexation.[54] The assertion that anyone, particularly County staff, could be confused or misled is simply implausible.

4) The Commission's Notice to the Public was Adequate.

The County Petition contends, without citation to any authority, that the Commission should have provided direct notice to residents of communities in unincorporated areas of the County that will be affected by the RCEC project.[55] Of course, the County recognizes that there is no legal requirement to provide direct notice to "residents" of communities, incorporated or unincorporated. Does the County itself provide direct written notice to all County residents of its land use and planning proceedings? The Commission did provide written notice to property

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[52] Annexation Agreement, p. 17

[53] The Request for Participation described the location of the site, as amended, as "directly west of the City of Hayward's WPCF between Depot Road and Enterprise Avenue."

[54] Amendment #1, Project Description, Sec.2.1.1 states: The project as amended will require a revised site located as shown in Figure 2.1-1 with power plant facilities as shown in the General Arrangement drawing Figure 2.1-2. The center property will now total approximately 18.8 acres located in both the City of Hayward and presently unincorporated Alameda County."

[55] County Memorandum, p. 9

owners immediately adjacent to the project site. The County has failed to show that residents of unincorporated area of the County not immediately adjacent to the project site will be affected.

The County's complaint that the Commission held its hearings in Hayward is even more preposterous.[56] The Commission made an extraordinary effort to hold all workshops, Committee hearings and conferences in the local community. The Commission should be praised for this effort, rather than criticized for not holding the hearings in Castro Valley or beyond.

5) The Commission's consideration of the FAA letters was proper.

The County's final assertion of legal error is that the Commission admitted into evidence a series of letters from the Federal Aviation Administration without allowing the parties, interested government agencies and the public the time or opportunity to rebut the opinions contained within the letters.[57] This allegation is another instance where the County is simply grasping at straws.

First, before two letters from the FAA were received into evidence, a FAA spokesman testified under oath on the record regarding these letters.[58] At the conclusion of this testimony, the Commission asked if there was any objection to receipt of the letters into evidence.[59] No objection was interposed.[60] At least one Alameda County representative was present at the hearing, but did not object to the introduction of the letters. Moreover, after the letters were received into evidence, the Commission opened the hearing to allow any person present to

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[56] *Id.*

[57] *Id.* at 10-11

[58] Commission Business Meeting, Sept, 26, 2007, Tr. 11-24

[59] *Id.* at 24

[60] *Id.*

address the letters or any other relevant matter pertaining to the Amendment.[61] The Commission allowed all persons present to speak and imposed no time limit on the speakers.

The only person that suggested the need for additional time to review the FAA letters was Mr. Sorenson. However, the sole reason he stated for additional time to review the FAA letters was so that the ALUC might consider changing its position of opposition to the project to a position of support.[62]

The Commission had already held the evidentiary record open for a substantial period of time to accommodate the County.[63] Because no one objected to receiving the letters into evidence, because the Alameda County ALUC was already on record in opposition to the project and because Mr. Sorenson's reason for suggesting more time to review the FAA letters was that the ALUC "might" change their opinion to support the project, the Commission was entirely justified in accepting the FAA letters into evidence and denying the County's belated request for a further delay in the proceeding. Even had the Alameda County ALUC taken additional time to review the letters and had changed their position of opposition to support, this change would not have materially affected the outcome of the proceeding.

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[61] *Id.*

[62] "The other issues that the Board is concerned about, they may not be all of the issues, but certainly some of them, at this point, are this whole aircraft and airport operations issue; the Airport Land Use Commission, which is appointed by the Board of Supervisors, weighed in on this.

"They acted in a timely way, I think. And actually recommended that the site be relocated; that the land use be relocated. They felt that the risk was too great. They haven't had the benefit of this latest FAA information. And perhaps that would be one of the outcomes of a continuance is that the ALUC could revisit it.

"I know that the ALUC works very closely with the Division of Aeronautics, and I believe at this point in time, with the information that I've heard, that all I can report today is that the ALUC would support what the Division of Aeronautics has suggested. If they were to get this back again and look at it, and have the benefit of hearing both sides, the FAA and the Division, they might change their opinion. But their opinion right now is to - - that the site, or the use should be relocated." September 26, 2007 Transcript, pp. 39-40

[63] Evidentiary Hearing, July 19, 2007, Tr. 277, lines 10-14

b. Chabot has not shown legal error.

Chabot's allegations of legal error are similarly flawed and even less substantive. Chabot alleges that Commission failed to notify Chabot of the Amendment Application.[64] We have addressed the question regarding notice above and in our Opposition to Chabot's untimely Petition to Intervene.

In addition, Chabot asks to incorporate by reference the County's other allegations of legal error as set forth at pages 11 though 20 of the County's Petition for Reconsideration.[65] We have addressed these issues in the preceding section of this Opposition.

c. The Group Petitioners have not shown legal error.

Because the Group Petitioners have filed a single pleading incorporating the Petition to Intervene and the Petition for Reconsideration, the Project Owner has not been able to ascertain which allegations are applicable to the Intervention and which are applicable to the Request for Reconsideration. Moreover, the Petition does not contain a clear statement of legal or factual error. The closest the Petition comes to asserting legal error is the assertion that these proceedings have deprived the Group Petitioners of the "fundamental privileges and entitlements" of relying on "staff and experts of their local jurisdictions to investigate and analyze impacts of proposals".[66] However, the Petition does not explain how the Group Petitioners have been deprived of this alleged "fundamental right." Given the extensive participation of the City of Hayward and the Alameda County ALUC in this proceeding, Group Petitioners allegation is unsound and unsupported.

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[64] Chabot Memorandum, p. 4

[65] *Id.* at 6

[66] Group Petition, p. 6, lines 14-17

4. The Petitions fail to explain what matters could not have been considered during the evidentiary hearings and their effects on a substantive element of the decision.

The Commission's rules require that the Petition for Reconsideration fully explain what matters could not have been considered during the evidentiary hearings and effects on a substantial element of the decision. All three Petitions fail to do so.

a. Alameda County

The County's Petition identifies three concerns that it alleges the County did not have "enough notice and time to sufficiently examine." These alleged concerns are:

- The impact of air pollution from the RCEC on nearby residents of unincorporated Alameda County,
- The ability of the County transportation infrastructure to accommodate an evacuation should there be a hazardous discharge, and
- The potential financial impact on regional redevelopment plans.[67]

However, under the Commission's rules a Petition for Reconsideration must do more than provide a laundry list of concerns. The Petition must explain what matters could not have been considered during the evidentiary hearings and effects on a substantial element of the decision. The County's Petition does not do so.

Each of the three concerns raised by the County was considered extensively during the evidentiary hearings both in the original licensing proceeding and in the Commission's review of the Petition for Modification.

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[67] County Memorandum, p. 8

1) Air Quality

The potential impact of pollution of the RCEC on nearby residents was extensively evaluated by the Bay Area Air Quality Management District and the Commission.[68] The County was aware or should have been aware of this evaluation. Two members of the Alameda County Board of Supervisors sit on the Board of the Bay Area Air Quality Management District.[69] Thus, they had a direct opportunity to ensure an exhaustive air quality analysis in the course of the District's review. Moreover, because Mr. Sorenson and the Board of Supervisors were aware of this proceeding as early as last December, they have had a lengthy opportunity to raise any questions or concerns regarding air quality at any point in this proceeding. The County's Petition fails to explain what these concerns are and why they were not raised.

2) Transportation Structure and Evacuation

The ability of the County transportation infrastructure in relation to the use and transportation of hazardous discharge was expressly considered in this proceeding.[70]

The County's Petition concedes that a Request for Participation was sent to the Alameda County Public Works Department and the Alameda County Hazardous Materials Team, two agencies with direct responsibility over transportation and evacuation. However, the County's Petition fails to explain what concern the County has regarding transportation and evacuation that was not raised and considered in the proceeding, and the Petition fails to explain why the concerns were not raised.

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[68] Commissions Final Decision on the RCEC Amendment #1, September 26, 2007, pp. 75-113

[69] Alameda County is represented on the BAAQMD Board of Directors by Supervisors Scott Haggerty and Nate Miley. http://www.baaqmd.gov/brd/brddirectors/members.htm

[70] Id. at 114-120; See Haz-12 and Haz-13 – A site specific security plan, including evacuation procedures will be prepared and approved by the Commission prior to the start of construction. The County is not foreclosed from participating in the review of this plan

The County cannot argue that these agencies did not respond to the Request for Participation because they were misled into believing that the project site will be in the City of Hayward because the use of County infrastructure is a potential concern regardless of the specific site location.

3) Financial impacts.

As with the other alleged concerns, the County's petition does not explain what concerns the County has with potential financial impact on regional redevelopment plans and why the concerns were not raised. The Annexation Agreement approved by the Alameda County Board of Supervisors in December 2006 indicates that the County had undertaken a detailed analysis of the financial impacts of the RCEC project, as amended, and approved the Annexation in light of these impacts.[71] Given that the Board of Supervisors was aware of the pending proceedings as early as last December, the Petition fails to explain why the Boards' financial concerns, if any, were not raised in the Commission proceeding.

Not only has the Petition failed to identify specific matters and explain why they could not have been raised during the proceeding, the Petition further fails to explain how these matters would affect a substantial element of the decision. In the absence of such a showing, the Petition for Reconsideration must be denied.

b. Chabot

Chabot incorporates by reference the County's allegation of legal errors.[72] However, Chabot makes no effort whatsoever to explain what matters could not have been considered

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[71] See Section 3.a.2., above.

[72] Chabot Memorandum, p. 6

during the evidentiary hearings and effects on a substantial element of the decision. On that basis, Chabot's Petition for Reconsideration must be denied.

c. Group Petitioners

The Group Petitioners offer several declarations with various allegations of legal and factual error. However, these Petitions fail to explain what matters could not have been considered during the evidentiary hearings and their effects on a substantial element of the decision. In fact, many of the matters raised in these declarations, such as aviation safety, air quality and public health, were raised by the Group Petitioners during the course of the proceeding. The declarations filed by the Group Petitioners are from persons who appeared personally or through representatives in the workshops and hearings during the Amendment proceeding.[73] Particularly, in light of such participation, Commission rules require that the Petitioners explain fully why the matters set forth in the declarations could not have presented during the evidentiary hearings. The Group Petition fails to do so.

III. CONCLUSION

These three Petitions for Reconsideration must be dismissed. The Petitioners lack standing to file a Petition for Reconsideration because as a result of their own knowing inaction none is a Party to the proceeding. Moreover, even if these Petitioners were a Party, the Petitions are fatally flawed because they do not set forth new evidence or legal error that would warrant reopening of the proceeding. The Petitions make much ado about the alleged failure to provide legal notice, without acknowledging that these parties had actual, early and detailed knowledge and notice of the proceeding and ample opportunity to participate in the proceeding. Moreover,

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[73] See Section B.3 of Project Owner's Opposition to the Petitions to Intervene.

some of the Petitioners were in fact active participants. Others elected to sit on the sidelines, but now ask the Commission to in effect reward them for their own inaction.

Where the Amendment proceeding extended over ten months and involved four workshops, four Committee hearings and conferences, two hearings before the full Commission, 2,112 pages of documents and analyses generated by the Commission and two extensions of time (one for the Alameda County ALUC and one for the FAA), the Amendment proceeding was certainly not a "rush to judgment" as the County alleges. This proceeding was a careful, thorough and exhaustive administrative review that resulted in a detailed 205 page decision containing 212 conditions of certification. The Petitions for Reconsideration have shown no cause for reopening the proceeding or reconsidering the decision. The Petitions for Reconsideration must be denied.

October 31, 2007

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By /s/ Gregg Wheatland

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EXHIBIT A

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the Application for Certification of	)	
the Russell City Energy Center Project	)	DECLARATION OF
	)	MICHAEL ARGENTINE
	)	

DECLARATION OF MIKE ARGENTINE

I, Michael Argentine, declare that:

1. I am Project Manager for the Russell City Energy Center Project and the person responsible for managing the licensing of the Russell City Energy Center on behalf of the Applicant, Russell City Energy Company, LLC .
2. In my capacity as Project Manager of the Russell City Energy Center, I am responsible for all aspects of the development of the project, including the procurement of necessary permits, approvals, and equipment, among other general development duties.
3. Russell City Energy Company, LLC is jointly owned by Russell City Energy Center, LLC (a wholly owned indirect subsidiary of Calpine Corporation)(65%) and Aircraft Services Corporation (a wholly owned indirect subsidiary of General Electric Company)(35%).
4. Russell City Energy Company, LLC is not a party to the Calpine Corporation bankruptcy proceeding filed in December of 2005 and thus is not a bankruptcy "Debtor" entity.
5. At page 10 of the California Energy Commission's Final Decision on the Amendment for the Russell City Energy Center Project states: "The amended project will continue to

include two Siemens Westinghouse "F class" combustion turbine generators (CTGs) equipped with dry, low oxides of nitrogen (NOx) combustors and steam injection capability* * *."

6. Russell City Energy Company, LLC owns the two CTGs that it has designated for use at the Russell City Energy Center and has these turbines in storage at a facility in or near North Las Vegas Nevada.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Folsom, California.

Dated: October 31, 2007

Michael Argentine

Michael Argentine
Project Manager
Russell City Energy Center Project

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the Application for Certification of	)	
the Russell City Energy Center Project	)	
	)	
	)	

PROOF OF SERVICE

I, Karen A. Mitchell, declare that on October 31, 2007, I deposited copies of the attached *Opposition to the Petitions for Reconsideration of the County of Alameda, The Chabot-Las Positas Community College District and The Group Petitioners* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

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

/s/ Karen A. Mitchell
Karen A. Mitchell

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the Application for Certification of	)	
the Russell City Energy Center Project	)	
	)	
	)	

OPPOSITION TO THE PETITIONS TO INTERVENE OF THE COUNTY OF ALAMEDA, THE CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT AND THE GROUP PETITIONERS

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EXHIBITS

A. Report of Conversation, Prepared by James Adams, February 9, 2007, 01-AFC-7c, Log #39238

B. Mt. Eden Redevelopment Sub-Area Annexation and Public Improvement Agreement, By and Among City of Hayward, County of Alameda and Redevelopment Agency of the County of Alameda, dated December 19, 2006

C. Memorandum from James E Sorenson, Executive Director, Alameda County Redevelopment Agency to the Alameda County Board of Supervisors, re Agenda Item No. 26 – Mt. Eden Annexation and Public Improvement Agreement, dated December 4, 2006

D. Memorandum from James E Sorenson, Executive Director, Alameda County Redevelopment Agency to the Alameda County Board of Supervisors, re Agenda

Item No. 27 – Mt. Eden Annexation and Public Improvement Agreement, dated December 4, 2006

E. Summary Action Minutes, Alameda County Board of Supervisors, December 19, 2006, items 26 and 27

F. Commission Order Denying WEM's Petition for Review, August 14, 2002, Docket No. AFC-7

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