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DOCKET	
01-AFC-7C	
DATE	JUN 30 2008
RECD.	JUN 30 2008

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9 STATE OF CALIFORNIA
State Energy Resources
10 Conservation And Development Commission

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12 In the Matter of:

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15 **RUSSELL CITY ENERGY CENTER,**

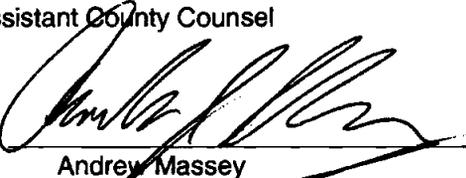
Docket No.: 01-AFC-7C

County of Alameda's Comments on
Russell City Energy Company LLC's
Petition for Extension of Deadline for
Commencement of Construction for the
Russell City Energy Center

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19 DATED: June 30, 2008

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and for the County of Alameda, State of
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11 Docket No.: **01-AFC-7C**

12 In the Matter of:

13 County of Alameda's Comments on
14 Russell City Energy Company LLC's
Petition for Extension of Deadline for
Commencement of Construction for the
Russell City Energy Center

15 **RUSSELL CITY ENERGY CENTER,**

16 On June 18, 2008, the County of Alameda ("the County") received from the California
17 Energy Commission ("the Commission") a Notice of Receipt of the Petition to Extend
18 Construction Deadline for the Russell City Energy Center Project (01-AFC-7C) dated June 13,
19 2008 ("Notice of Receipt"). The Notice of Receipt invites any member of the public to provide,
20 no later than July 1, 2008, oral or written comments on Russell City Energy Company LLC's
21 Petition for Extension of Deadline for Commencement of Construction for the Russell City
22 Energy Center ("the Petition"), filed May 30, 2008. The following constitutes the County's
23 comments on said Petition.

24 **PROCEDURAL HISTORY**

25 On September 11, 2002, the Commission certified 01-AFC-7, allowing the Calpine
26 Corporation to construct the Russell City Energy Center ("RCEC"). The RCEC license provided
27 Calpine with five years to commence (as opposed to complete) construction. The deadline for
28

1 commencement of construction was September 11, 2007. Due to a lack of financing, Calpine
2 Corporation never commenced construction of the RCEC. In November, 2006, Calpine filed a
3 petition to amend the RCEC license to move it to a different location and make some other
4 modifications. On April 23, 2007, Calpine filed a petition to change ownership of RCEC to the
5 Russell City Energy Company, LLC ("the applicant"), a joint venture between Calpine and
6 Aircraft Services Corporation, a wholly owned indirect subsidiary of General Electric Company.
7 On August 1, 2007, the Commission approved the transfer of ownership.

8 On July 25, 2007, Calpine filed a Petition to Extend the Deadline to Commence Construction
9 of RCEC. In the petition, Calpine requested an additional year to commence construction of the
10 RCEC. At that time neither the change of ownership petition nor the amendment petition had
11 been approved. On August 29, 2007, the Commission approved the petition to extend the
12 deadline to commence construction by the one year requested. The original September 11,
13 2007 deadline was extended to September 11, 2008. To date, the applicant has not
14 commenced construction of the RCEC.

15 On May 30, 2008, the applicant filed a second petition to extend the deadline to commence
16 construction of the RCEC. The petition cites four factors that caused delay in the construction
17 of the RCEC: (1) three groups, including the County, filed petitions for reconsideration; (2) three
18 groups, including the County, filed writ of mandate petitions with the California Supreme Court;
19 (3) Hayward resident Rob Simpson appealed the Bay Area Air Quality Management District's
20 ("BAAQMD") issuance of an Authority to Construct permit with BAAQMD Hearing Board; and (4)
21 Mr. Simpson also appealed BAAQMD's issuance of a PSD permit with the Environmental
22 Appeals Board ("EAB") of the U.S. Environmental Protection Agency ("EPA"), which awaits
23 resolution. The applicant also indicated that it still lacked financing for the RCEC.

24 **STANDARD OF REVIEW**

25 Title 20, C.C.R. § 1720.3 provides that

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1 [u]nless a shorter deadline is established pursuant to [Public
2 Resources Code] § 25534, the deadline for the commencement of
3 construction shall be five years after the effective date of the
4 decision. Prior to the deadline, the applicant may request, and the
5 commission may order, an extension of the deadline for good
6 cause.

7 Section 1720.3 does not provide for the procedure by which the Commission should review
8 petitions filed pursuant to its provisions, nor the criteria by which applicants may establish good
9 cause for an extension.

10 It is also noteworthy that applicants rarely file § 1720.3 petitions.¹ During the past decade,
11 most applicants promptly began construction of certified projects, often within one day of
12 Commission approval.² The infrequency of § 1720.3 petitions may explain the disparate
13 treatment in different AFC proceedings. For example, in SEPCO (92-AFC-2C), the Commission
14 conducted a full evidentiary hearing on the issue of good cause, whereas the first RCEC petition
15 was approved at a Commission Business Meeting without significant discussion.

16 The County believes the Commission should consider every §1720.3 petition under the
17 same standard of review and in accordance with the same procedure. In that regard, the
18 Commission should adhere to its own precedent, set in the SEPCO AFC (92-AFC-2C) and
19 discussed in detail below, for consideration of this § 1720.3 petition.

20 **A. The Commission Must Follow the SEPCO Precedent**

21 The Commission first adopted § 1720.3 in 1993, but did not receive its first petition under
22 the new section until 1999 in the SEPCO AFC (92-AFC-2C). (Committee Order, Feb. 7, 2000.)
23 Unsure of the applicable procedure and standard of review for considering the SEPCO § 1720.3

24
25 ¹ Indeed, the County's review of past Commission siting cases indicates that applicants in only four AFC
26 proceedings have applicants ever filed petitions for extensions of the deadline to commence construction
27 under § 1720.3: Sacramento Ethanol and Power Cogeneration Project ("SEPCO") (92-AFC-2C), Salton
28 Sea Geothermal Power Plant Project (02-AFC-02), East Altamont Energy Center Project (01-AFC-4C),
and RCEC (01-AFC-7C).

² See "California Energy Commission - Energy Facility Status, Projects Since 1997," at
http://www.energy.ca.gov/sitingcases/all_projects.html (last updated 6/20/08).

1 petition, the Commission conducted a “committee procedural conference” to determine how the
2 Commission should proceed. (*See generally* Transcript of Committee Procedural Conference,
3 SEPCO Compliance Proceeding, 92-AFC-2C, July 1, 1999 (hereinafter “CPC Transcript”).)

4 The SEPCO compliance proceeding on the § 1720.3 petition resulted in an important and
5 thoroughly considered precedent that should serve as the basis for consideration of all future §
6 1720.3 petitions. Indeed, that appears to have been the purpose of considering the matter at
7 length. Then-Commissioner Laurie noted: “This is a matter of first impression for the
8 Commission. And I want to make sure that any precedent set is a rational one.” (Transcript of
9 Hearing on SEPCO Petition to Extend Deadline to Commence Construction, SEPCO
10 Compliance Proceeding, 92-AFC-2C, January 24, 2000 (hereinafter “Merits Transcript”);
11 Committee Order, Feb. 7, 2000 (“Therefore, the Committee desires to establish a rational
12 process by which such petitions may be judged.”).) The SEPCO compliance proceedings
13 established three important precedents, discussed in detail below.

14 1. The Commission Must Make Good Cause Findings Under the § 1769(a)
15 Standard

16 The SEPCO committee accepted Staff’s argument that § 1720.3 petitions must be
17 considered procedurally in the same manner as amendment petitions under § 1769(a). (CPC
18 Transcript, at 7-15³; Commission Order Re: Petition to Extend Start of Construction, Order No.
19 99-0526-02 (May 26, 1999).) Section 1769(a) otherwise provides the procedure and standard
20 of review for the consideration of petitions to amend the conditions of certification.

21 This conclusion has two implications. First, § 1720.3 petitions would be subject to the same
22 procedural handling as § 1769 amendment proceedings, including required notices and
23 comment periods. Second, the showing of good cause required under § 1720.3 would need to
24 satisfy the factors listed in § 1769(a)(1)(A) – (G)⁴ that are necessary to support the findings

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26 ³ The CPC Transcript lacks line numbers; therefore, citations are to the page numbers only. The Merits
27 Transcript does have line numbers.

28 ⁴ Those factors are as follows:
(A) A complete description of the proposed modifications, including new
language for any conditions that will be affected;

1 required for the Commission to approve a license amendment under § 1769(a). (CPC
2 Transcript, at 7-15.)

3 2. The Commission Must Hold an Evidentiary Hearing on Good Cause Issue

4 To demonstrate the applicant had satisfied each element of subparts (A) – (G) of §
5 1769(a)(1), the committee found it necessary to create an administrative record, including sworn
6 testimony under oath and subject to cross-examination. (CPC Transcript, at 17-19.) The
7 Hearing Officer explained that the testimony had “to be under oath, subject to cross-
8 examination. That’s the evidentiary basis on which you can base a finding in a quasi-judicial
9 hearing.” (Id., at 19.) The Hearing Officer went on to explain that while the hearing need not be
10 “elaborate,” “the fact that the matter may not be in dispute is probably not sufficient for the
11 Committee to make its finding of good cause.” (Id., at 18.) The Committee ultimately adopted
12 the Hearing Officer’s recommendation, as evidenced in the conduct of the subsequent hearing
13 on the merits. (*See generally* Merits Transcript.)

14 3. The Commission Must Conduct CEQA Review

15 In a May 26, 1999 order, the Commission held that “[t]he granting of an extension to start
16 construction of the power plant is a discretionary decision that is subject to CEQA.” (Order No.
17 99-0526-02, at 2.) Procedurally, CEQA review is the second step of a two-part analysis. At the
18 SEPCO hearing on the merits, the Hearing Officer explained that “[i]f the Committee finds good
19 cause for the extension we are directed to carry out the required environmental analysis under
20 CEQA.” (Merits Transcript, at 6:7-9.) In the SEPCO proceedings, the Committee adopted a

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23 (B) A discussion of the necessity for the proposed modifications;
24 (C) If the modification is based on information that was known by the petitioner
25 during the certification proceeding, an explanation why the issue was not
26 raised at that time;
27 (D) If the modification is based on new information that changes or undermines
28 the assumptions, rationale, findings, or other bases of the final decision, an
explanation of why the change should be permitted;
(E) An analysis of the impacts the modification may have on the environment
and proposed measures to mitigate any significant adverse impacts;
(F) A discussion of the impact of the modification on the facility’s ability to
comply with applicable laws, ordinances, regulations, and standards;
(G) A discussion of how the modification affects the public;
(§ 1769(a)(1).)

1 recommendation to conduct a scoping session to identify the topic areas where new information
2 or changed LORS would apply.

3 DISCUSSION

4 I. Section 1720.3 Does Not Provide for the Grant of Multiple Petitions

5 The applicant's second petition to extend the deadline to commence construction presents
6 an issue of first impression of its own: it is the first time the Commission has been asked to
7 grant two § 1720.3 petitions in a single AFC proceeding. The Commission may be faced with
8 this issue for the first time because the language of § 1720.3 does not provide for the granting of
9 multiple petitions. Instead, the regulatory language indicates that "the applicant may request,
10 and the commission may order, *an* extension of the deadline for good cause." (§
11 1720.3)(emphasis added).

12 When interpreting the language of § 1720.3, the Commission should follow the basic
13 principle of statutory construction that the written language should be given its plain and
14 ordinary meaning. Thus "[i]f the words of the statute are clear, the [reviewing body] should not
15 add to or alter them to accomplish a purpose that does not appear on the face of the statute or
16 from its legislative history." (*People v. Morris* 46 Cal. 3d 1, 15 (1988), disapproved on other
17 grounds in *In re Sassounian* 9 Cal. 4th 535, 543-544, fn. 5 (1995) (internal citations removed).)
18 The language of § 1720.3 is clearly and unambiguously written in the singular. Therefore, it
19 only provides for the granting of a single petition for an extension of time to commence
20 construction. As the Commission already granted such a petition for the RCEC on August 29,
21 2007, the second petition should be denied.

22 II. THE APPLICANT HAS NOT DEMONSTRATED GOOD CAUSE

23 Under the standard of review outlined above, the applicant has not demonstrated good
24 cause for an unprecedented second extension of the deadline to commence construction of the
25 RCEC. The reasons the applicant identifies in its petition do not demonstrate good cause, and
26 fail to satisfy the elements of § 1769(a)(1). Furthermore, the applicant should be required to
27 demonstrate that it has a reasonable likelihood of obtaining financing, given its continued
28 inability to date to do so.

1 **A. Subsequent Litigation Not a Valid Basis for Showing of Good Cause**

2 The applicant relies primarily on a series of appeals as the basis for granting its second
3 petition. Subsequent litigation alone cannot form the basis of good cause, especially since it
4 satisfies none of the § 1769(a)(1) factors. Moreover, the applicant should have anticipated the
5 possibility of litigation when it made its first request to extend the deadline to commence
6 construction. The RCEC amendment petition was very controversial and provoked
7 considerable public upset in the local community. It was therefore unreasonable to expect to be
8 able to commence construction under the license within the time frame that RCEC previously
9 thought. This error in judgment does not constitute good cause.

10 **B. Lack of Financing Cannot Constitute Good Cause**

11 If lack of financing alone can support a finding of good cause, then nothing would prevent
12 applicants from receiving an endless series of extensions of the deadline to commence
13 construction.⁵ Moreover, if lack of financing alone became the standard for a showing of good
14 cause, applicants would lose the incentive to find financing in advance of seeking Commission
15 certification for a thermal power plant project. Applicants without financing could seek
16 Commission certification with no intention of ever constructing the facility, but instead simply
17 pocket the license to sell at a profit in the future. Commission licenses are intended as a means
18 to the construction of electric power facilities necessary to the health, safety and welfare of the
19 people of California, not some sort of commodity in and of themselves.

20 At a recent Commission Business Meeting, Chairwoman Pfannenstiel indicated that the
21 Commission has grown wary of applicants that simply want to “pocket the license for some
22 future value.” (Transcript of the April 16, 2008 Commission Business Meeting, at 66:15-16.)
23 The Commission should conduct an evidentiary hearing to get assurances from the applicant
24 that it has a realistic likelihood of obtaining financing and does not intend simply to make a profit
25 from the sale of the license.

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28 ⁵ Except that § 1720.3 does not appear to provide for multiple extensions of the deadline to commence construction (*see infra*).

1 **C. If Lack of Financing Constitutes Good Cause, the Applicant Must Explain**
2 **Why It Currently Lacks Financing and When It Will Obtain Financing**

3 If in the alternative the Commission accepts the applicant's lack of financing as a basis for a
4 finding of good cause, then the Commission must conduct an evidentiary hearing to determine
5 why the applicant lacks financing and when the applicant is likely to obtain financing to ensure
6 that multiple delays will not cause the applicant to proceed on a stale license. In SEPCO, the
7 committee evidenced a very serious policy concern that the applicant would be proceeding on a
8 stale license. In its February 7, 2000 Committee Order, the committee noted that the SEPCO
9 petition was merely the first step of the applicant's plan to file a petition to amend the license,
10 and then a possible petition for change in ownership. (Committee Order, Feb. 7, 2000.) The
11 order went on to state that "[t]hese factors create confusion for the Commission staff which must
12 analyze the project, for the members of the Commission who must consider [the applicant's]
13 petition, and, most significantly, for the members of the public who wish to understand the
14 nature of this project." (Id.) The ongoing uncertainty surrounding SEPCO's license ultimately
15 lead the Commission to deny the petition to extend the deadline to commence construction and
16 terminate the SEPCO AFC. (*See* Commission Order, April 6, 2000.)

17 Lack of financing has plagued the RCEC since the original approval of the AFC in
18 September of 2002, and prevented the original applicant, Calpine, from commencing
19 construction. Presumably Calpine formed a joint venture with a subsidiary of General Electric to
20 shore up the financing for the project. Yet the second Petition once again indicates that the
21 applicant does not have the financing to commence construction.

22 Under the second Petition, the applicant would not be required to even *commence*
23 construction, much less complete it, before 2010, a full eight years after the original approval.
24 Given the enormous changes in the energy market and regulatory landscape since 2002, what
25 may have been acceptable then may be outdated by the time construction is completed some
26 time after 2010.

1 **D. The Applicant Must Demonstrate It Can Meet the § 1769(a)(1) Findings**

2 The applicant's second Petition nowhere indicates that it will be able to satisfy all of the
3 criteria in § 1769(a)(1). The Commission should require the applicant to make a second
4 application that includes information that would satisfy the all of the § 1769(a)(1)⁶ factors. In
5 addition, the Commission should conduct an evidentiary hearing and require the applicant to
6 present evidence under oath and subject to cross-examination in support of its showing of good
7 cause.

8 In particular, the applicant should be required to demonstrate the RCEC's ability to meet
9 several intervening changes in LORS since the time of the September 2007 approval of the
10 amendment. The applicant should be required to provide evidence that the RCEC will comply
11 with changes in LORS, or indicate that the changed LORS will require further project
12 modifications.

13 First among the changes in LORS is the new state standard for NO₂ adopted by CARB on
14 March 20, 2008. In the recent Eastshore Energy Center (06-AFC-6) proceedings, the
15 Eastshore Committee PMPD has required the applicant to consult with CARB to identify the
16 appropriate methodology for the new state standard and provide evidence at a supplemental
17 evidentiary hearing. (See Notice of Availability of the Presiding Member's Proposed Decision
18 and Notice of Evidentiary Hearing and Notice of Committee Conference, Eastshore Energy
19 Center, 06-AFC-6, June 20, 2008 (hereinafter "Eastshore PMPD Notice").) Application of the
20 new and more stringent state standard is particularly important where, as here, the Commission
21 Final Decision approving the RCEC AFC expressed concern about the level of ozone
22 precursors, such as NO_x, that the facility will emit given that the local area is already out of
23 attainment for ozone. (RCEC, Commission Final Decision, CEC-800-2007-003-CMF, Sept. 26,
24 2007, at 76-77.) The Commission should require the applicant to perform the same level of

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26 ⁶ The Notice of Receipt for the RCEC indicates that the Commission will consider the Petition in
27 accordance with the provisions of § 1769(b). Section 1769(b) concerns the standard of review for a
28 petition to change ownership, which has nothing to do with a petition for extension of time to commence
construction. Moreover, the SEPCO committee specifically identified the § 1769(a) factors as the basis
for findings in support of a petition under § 1720.3. (CPC Transcript, at 7-15.)

1 consultation with CARB and present the same amount of information at an evidentiary hearing
2 as the Eastshore committee will require of that facility's applicant.

3 Second, again as identified in the recent Eastshore PMPD Notice, the applicant should be
4 required to provide evidence regarding the relevance of the new ambient air quality data from
5 CARB's March 18, 2008 Draft Health Risk Assessment on diesel particulate emissions in the
6 Oakland area for the purpose of characterizing ambient air quality in the East Bay to ensure that
7 the health risk assessment performed by Dr. Alvin Greenberg continues to be viable. This
8 evidence is particularly important because the RCEC is to be constructed in a densely
9 populated urban area with a significant existing burden of disease related to air pollution. (See
10 Race, Class and the Patterns of Disease Distribution in Hayward: Decision-Making that
11 Reinforces Health Inequity, Eastshore Energy Center, 06-AFC-6, Exhibit 532.) CARB's new
12 Draft Health Risk Assessment may alter some of Dr. Greenberg's findings and necessitate
13 further mitigation or project modification.

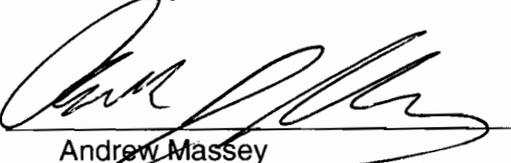
14 III. Conclusion

15 The scant history of petitions to extend the deadline to commence construction under §
16 1720.3 suggests that the applicant seeks an unprecedented second extension not provided for
17 in the Commission's regulations. For this reason alone, the petition should be denied. On the
18 merits, the applicant has failed to demonstrate how it would satisfy any of the elements of §
19 1769(a)(1) necessary for a finding of good cause. Instead, the applicant simply cites its failure
20 to anticipate possible litigation and its continued lack of financing. That showing does not
21 demonstrate good cause for what amounts to extraordinary relief. Moreover, even assuming
22 the applicant were able to demonstrate good cause, the Commission must then perform CEQA
23 review.

24 Throughout this process, the Commission should be mindful of the risks involved in allowing
25 applicants to proceed on stale licenses and the possibility of an applicant requesting an
26 extension of time simply to sell the license, rather than construct the power plant. Under these
27 circumstances, the County respectfully requests that the Commission deny the applicant's
28 second Petition.

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Assistant County Counsel

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

Amendment to the APPLICATION
FOR CERTIFICATION OF THE
RUSSELL ENERGY CENTER
POWER PLANT PROJECT

Docket No. 01-AFC-7C
PROOF OF SERVICE
(Revised 7/6/07)

INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 01-AFC-7C
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DECLARATION OF SERVICE

I, Dalia Liang, declare that on June 30, 2008, I deposited copies of the attached: County of Alameda's Comments on Russell City Energy Company LLC's Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center in the United States mail at Oakland, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

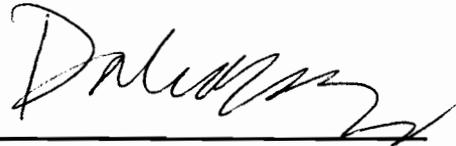
OR

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

OR

I deposited the same document at a designated place for collection maintained by Federal Express, an express service carrier, with fully-prepaid delivery fees, and addressed to those identified on the Proof of Service listed above.

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.



Dalia Liang