

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**DOCKET**
01-AFC-7CDATE SEP 19 2008RECD. SEP 19 2008

In the Matter of:) Docket No. 01-AFC-7C
)
)
RUSSELL CITY ENERGY CENTER) STAFF RESPONSE
) TO
) PETITION FOR RECONSIDERATION
) CONCERNING EXTENSION OF
_____) CONSTRUCTION DEADLINE

INTRODUCTION

Mr. Rob Simpson petitions for reconsideration of the California Energy Commission's (Commission) July 30, 2008 order granting an extension of the construction deadline for good cause for the Russell City Energy Center (RCEC). The petition raises a variety of substantive and procedural claims, but fails to specifically set forth either new evidence relevant to the order that could not have been provided to the Commission when it made its decision, nor any error in fact or law, as required by the Commission's regulations. (Cal. Code Regs., tit. 20, § 1720 (a).) Accordingly, the petition should be denied.¹

PROJECT BACKGROUND

The RCEC project (Docket No. 01-AFC-7) was certified on September 11, 2002. RCEC is a 600 megawatt (MW) natural gas-fired, combined-cycle electric generating facility to be located in Hayward, California. A major amendment to move the project location 1,300 feet northwest of the original location, Docket Number 01-AFC-7C, was filed on November 17, 2006. Following a comprehensive environmental review conducted by Commission staff, as well as extensive public hearings, the amendment was approved by the Commission on October 2, 2007.

The initial deadline for commencement of construction of RCEC was September 10, 2007. On July 25, 2007, the project owner (Russell City Energy

¹ A second petition for reconsideration that was filed on August 29, 2008, purporting to be filed by "Californians for Renewable Energy (CARE) and Rob Simpson" attempts to raise the same issues as set forth in the petition filed by Rob Simpson. This second petition, which was filed without signature, return address, or proof of service, sets forth no relevant issues for the Commission to rule on that will not otherwise be considered in this Staff Response to Petition for Reconsideration filed by Rob Simpson.

Proof of Service (Revised 7/6/07) filed with original.
Mailed from Sacramento on 9/19/08 *JS*

Company, LLC) filed a petition to extend the deadline for the commencement of construction of the RCEC for one year, to September 10, 2008. The Commission issued an Order approving the extension on August 29, 2007.

The project owner filed a subsequent petition for a second extension on May 30, 2008. The petition stated that the owner has not been able to complete project financing or start construction by September 10, 2008, due to multiple appeals related to the Commission's decision, as well as a (then) pending appeal of the project's federal air permit filed by Mr. Simpson with the Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency (U.S. EPA).

On June 30, 2008, Mr. Simpson submitted a Petition for Intervention and an "Objection to Petition for Extension of Deadline for Commencement of Construction" consisting primarily of a copy of his appeal that had been filed before the EAB.

On July 30, 2008, the matter was heard during the Commission's regularly scheduled business meeting. Staff, the applicant, and members of the public, including Mr. Simpson, addressed the Commission and presented arguments regarding the petition. Staff noted that factors outside of the control of the project owner, including the appeal filed by Mr. Simpson with the EAB, had prevented the project owner from commencing construction, and concluded that the petition demonstrated good cause, as required by the Commission's regulations, for extending the deadline. (Cal. Code Regs., tit. 20, § 1720.3.) Staff further noted that the extension itself would not cause a significant effect on the environment, apart from that which had already been thoroughly reviewed in approving the 2007 major amendment. Staff recommended the Commission adopt an order approving the requested extension to September 10, 2010.

In accordance with the governing regulation (Cal. Code Regs., tit. 20, §1720.3), the Commission found that good cause existed to extend the deadline to commence construction and, thus, granted the project owner's petition. The Commission based its finding, in part, on the delay caused by the appeal that had been filed by Mr. Simpson before the EAB. (Docket No. 01-AFC-7C, Order No. 08-730-3.)

ANALYSIS

The California Code of Regulations, Title 20, Section 1720 provides in relevant part:

- (a) 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 the 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 up on a substantive element of the decision.

A. The PSD Permit Appealed to the EAB is a Separate Federal Permit.

The Commission license is a state permit indicating RCEC's satisfaction of all state-adopted air quality requirements. The Commission license is not, and cannot be, the federal permit for Prevention of Significant Deterioration (PSD permit), a strictly federal permit granted by U.S. EPA directly or through delegated air districts that "stand in the shoes" of EPA for the purposes of issuing the federal permit. (*Greater Detroit Res. Recovery Auth. v. U.S.E.P.A.* (6th Cir. 1990) 916 F.2d 317, 320-321, 323-324, *In re Russell City Energy Center* (EAB 2008) PSD Appeal No. 08-01 [slip opinion], p. 4, fn.1.) The Commission's license can be (and has been) challenged by petition to the State Supreme Court. (Pub. Resources Code, § 25531.) The federal PSD permit can be challenged only by petition to the EAB, and thereafter by appeal to the U.S. Court of Appeal.

The Bay Area Air Quality Management District (BAAQMD) has been delegated authority to issue U.S. EPA's PSD permit for projects in the the Bay Area with emissions above the PSD threshold. BAAQMD issues an Authority to Construct (ATC) permit after the Commission's licensing decision, and that ATC constitutes the federal PSD permit that Mr. Simpson appealed to the EAB. Mr. Simpson's appeal to the EAB was with regard to both procedural (noticing) and substantive issues. As was discussed at the July 30, 2008 hearing, the EAB sustained his appeal with regard to a narrow procedural issue—whether BAAQMD had noticed the PSD permit in conformity with all applicable federal regulations.

Thus, once the Commission granted a license for RCEC, the license remains a valid state license unless successfully challenged in the State Supreme Court. The challenge to a federal permit in a separate forum does not disturb the Commission's licensing authority, serve to invalidate the state license, or preclude the Commission from using its authority to extend the construction deadline under section 1720.3 of its regulations.

B. The Petitioner Fails to Set Forth any New Evidence.

The Petition to Extend the Deadline to Commence Construction was filed under section 1720.3 of the Commission's regulations, which allows an applicant to request, and the Commission to order, an extension of the construction deadline "for good cause."

The petitioner states that his appeal before the EAB was, in his opinion, "the basis for what's wrong with the project." However, nothing in Simpson's EAB appeal, and the substantive and procedural issues that it raised, is pertinent to the issue of

“good cause” for the construction deadline extension granted at the July 30 business meeting. Nevertheless, the petitioner would have the Commission re-open the underlying Commission proceedings and re-litigate the issues that have already been decided both during the original licensing proceeding as well as the 2007 major amendment proceedings.

The finding of good cause was based primarily on the RCEC’s inability to complete project financing and commence construction by the (then) deadline of September 10, 2008. The project owner’s inability to commence construction was due to multiple past appeals related to the Commission’s decision, which were ultimately decided in favor of the project owner, as well as the appeal of the project’s PSD permit filed by petitioner with the EAB. Thus, the finding of good cause was based on the *fact* of the appeal filed with the EAB, and not on the substance of that appeal, which was not germane to the proceedings regarding RCEC’s petition to extend the deadline to commence construction.

The petitioner has failed to put forth any new relevant evidence that could not have been produced during the evidentiary hearings on whether good cause existed to grant RCEC’s petition to extend the deadline to commence construction. Thus, the petitioner fails to meet the first prerequisite for reconsideration under section 1720 of the Commission’s regulations.

C. The Petitioner Fails to Set Forth an Error in Fact or Change or Error of Law.

Although it is somewhat difficult to discern from his petition, Mr. Simpson apparently asserts that, as a matter of law, the EAB’s remand of the PSD permit to BAAQMD requires that he be allowed to re-argue substantive issues already decided by the Commission in its underlying licensing and amendment proceedings. No legal authority is cited for this assertion, as no such authority can be found. Federal law (for PSD noticing, but also for substantive PSD requirements) must be completely satisfied before the project can go forward, and there is no requirement or advantage for the Commission to re-determine the issues for the state license it granted.

Petitioner Simpson further alleges that there was an “addition to the agenda” of the business meeting held in July in violation of Government Code Section 11125. That section requires that written notice be provided of meetings, including a specific agenda, and prohibits additions to that agenda. The RCEC petition was properly placed on the agenda for the business meeting, and remained on the agenda through the conclusion of the hearing where the Commission granted the petition to extend the deadline to commence construction. Contrary to the claim of petitioner Simpson, there was no unauthorized “addition to the agenda” to support his assertion of error in law or fact.

Nor was petitioner Simpson precluded from participating in the proceeding. The petitioner did, in fact, actively participate in the Business Meeting, arguing points

made before the EAB. As stated previously, however, the subject matter of his appeal before the EAB was not germane to the matter before the Commission: whether good cause existed to grant the petition to extend the commencement of construction. Petitioner would have had the Commission improperly reconsider matters that had already been decided both during the original licensing proceeding as well as in the thorough environmental review recently conducted pursuant to the Commission's amendment process for the 2007 major amendment. (Cal. Code. Regs., tit. 20, § 1769(a).) Ironically, it was the petitioner's appeal to EAB that provided the requisite good cause to warrant the granting of the RCEC's Petition to Extend the Deadline to Commence Construction. By failing to show an error in fact or a change or error in the law, the petitioner fails to meet the alternative second prerequisite for reconsideration.

RECOMMENDATIONS

The California Code of Regulations, Title 20, Section 1720, requires a showing that there is either new evidence that, despite the diligence of the moving party, could not have been produced during the evidentiary hearings in the case, or an error in fact or change or error of law. The petition for reconsideration fails to meet any of the prerequisites for reconsideration of the Commission's order to extend RECE's construction deadline. The construction deadline, therefore, should remain at September 10, 2010, and the "Petition for Reconsideration of California Energy Commission Business meeting Agenda Item 3 Russell City Energy Center WEDNESDAY, July 30, 2008," filed by petitioner Rob Simpson on August 28, 2008, must be DENIED.

Date: September 19, 2008

Respectfully Submitted,



Kevin W. Bell
Senior Staff Counsel