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DOCKET	
01-AFC-7C	
DATE	<u>SEP 19 2008</u>
RECD.	<u>SEP 19 2008</u>

10 STATE OF CALIFORNIA

11 STATE ENERGY RESOURCES

12 Conservation and Development Commission

13 In the Matter of:

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

18 Later Noticed as "Modification of the Application
19 for Certification for the Russell City Energy
20 Center"

Docket No.: 01-AFC-7C

GROUP OBJECTORS OBJECTIONS TO
PETITION TO EXTEND CONSTRUCTION
DEADLINE FOR RCEC PROJECT; AND

GROUP OBJECTORS DEMAND FOR
EVIDENTIARY HEARING

Date: Tentatively July 30, 2008

Location.: Sacramento

Time: TBD

1 commencement of construction.) As the July 27, 2007 petition reflects, this project was certified
2 on September 11, 2002, almost six years ago. After five years, this project never commenced
3 construction. Instead, the then project owner sought to “move” it by applying for an “amendment”
4 and this Commission generously granted an extension prior to the five year deadline.

5 As section 1720.3 provides, “an extension of the deadline” may be granted. This is clearly
6 in the singular preceded by “an” extension. If multiple extensions were contemplated, then this
7 easily could have been drafted as that the “commission may order extensions of the deadline” and
8 the section would provide for multiple extensions. It does not.

9
10 Additionally, consistent with other portions of these siting provisions, this section begins
11 with “[u]nless *a shorter deadline* is established . . .” This emphasizes the importance of requiring
12 such large thermal power plants being constructed within a short time with the state of the art
13 technology to mitigate their detrimental damage to our health and environment. Otherwise, by
14 granting extension after extension, the entire rationale for approval may be eliminated with the
15 discovery of changed circumstances and consequences, as it has for this project. Applying these
16 provisions together with the plain meaning of section 1720.3, as a matter of law this petition must
17 be denied on its face since it is not made “prior to the [five year] deadline” and this applicant
18 already obtained “an extension” on August 29, 2007.

19
20 **B. This Petition Is Deficient On Its Face For Failing To Provide The Minimum
Information Required Under Section 1769**

21 As the CEC’s Notice of Receipt of this petition to extend reflects, this petition is subject to
22 review and approval under section 1769 entitled “Post Certification Amendments and Changes.”
23 Under subdivision (a) of section 1769,¹ any petition seeking such a modification must include the
24 following, among other points:
25

26 _____
27 ¹ The CEC June 13, 2007, Notice of Receipt provides that this petition is under “section 1769(b),”
28 concerning “Change in Ownership or Operational Control.” Given the petition’s purpose,
presumably this was an inadvertent typographical error.

1 (B) A discussion of the necessity for the proposed modifications;

2 (C) If the modification is based on *information that was known by*
3 *the petitioner during the certification proceeding*, an explanation
4 *why the issue was not raised at that time*;

5 (D) *If the modification is based on new information that changes or*
6 *undermines the assumptions, rationale, findings, or other bases of*
7 *the final decision, an explanation of why the change should be permitted*;

8 (E) *An analysis of the impacts the modification may have on the*
9 *environment and proposed measures to mitigate any significant*
10 *adverse impacts*;

11 (F) **A discussion of the impact of the modification on the**
12 **facility's ability to comply with applicable laws, ordinances,**
13 **regulations, and standards**;

14 (G) A discussion of **how the modification affects the public**;

15 (H) A list of property owners potentially affected by the modification;
16 and

17 (I) A discussion of *the potential effect on nearby property owners, the public and*
18 *the parties in the application proceedings*.

19 (Emphasis and italics added.)

20 Here, this petition fails to even attempt to facially satisfy most of these minimum
21 requirements. Although the applicant summarily concludes without any support that “extension of
22 the deadline . . . to September 10, 2010 is in the public interest because it will allow time to
23 resolve pending litigation and will, thereafter allow the RCEC Project to be completed and to
24 provide a vital new source of clean, reliable electricity in the region,” conclusions with which
25 Group Petitioners/Intervenors disagree and object to. RCEC does not comply with current
26 applicable laws, ordinances, regulations and standards. Changed circumstances exist for this
27 project certified eight years ago affecting the surrounding public and operating entities in light of
28 the changed land use ordinances focusing on research and development, the ability of the Hayward
and Oakland airports to function and the doubling of the surrounding residential population.

1 Minimum points required by section 1769 are omitted. (*Compare*, petition by East
2 Altamont Energy Center, LLC, executed on May 16, 2008 by the same attorneys as that for
3 RCEC, p. 2, para. 3: “The EAEC, as first licensed . . . , will continue to comply with all
4 applicable laws, ordinances, regulations and standards and would not result in any significant
5 adverse impact on the environment.”) Under these circumstances, this petition should be
6 summarily denied as not satisfying the minimum requirements.

7
8 In *Sacramento Power, Inc.*, docket no. 92-AFC-2C, before the Commission was a
9 substantially similar deficient petition by Sacramento Power, or “SPI,” also made on the bases that
10 alleged “good cause” constituted “litigation that effectively stopped all development activities for
11 over two years” and “project financing.” (Attached for the convenience of the Commission is a
12 true and correct copy of the February 7, 2007 Order.)² The Commission’s response there likewise
13 applies:

14 . . . the project also failed to provide information concerning impacts
15 to air quality, biological resources, land use, and transmission line
16 engineering. . . . Petitioner has not provided sufficient information
for staff to conduct even an initial study under [CEQA].

17 (Commission Staff Position, p. 2.) Most significantly,

18 Staff stated its concern that the relevancy and validity of its original
19 analysis will continue to diminish with time, and noted the possibility
20 that if granted an extension, the SEPCO project could commence
operation as much *as ten years after the Commission granted*
certification. . . . [¶] . . . Staff recommends that . . . an Application
21 for Certification (AFC) [be filed when the applicant determines
the nature of its project] which can be analyzed in the normal
22 course of business, based on present environmental conditions
and current laws, ordinances, regulations and standards (LORS).

23
24 (Commission Staff Position, p. 3, italics added.) The Commission’s conclusion denying the

25
26 _____
27 ² In this regard, Group Objectors further object to the applicant’s contention that pending appeal
28 before the Environmental Agency Board on the lack of sufficient notice, among other defects, a

1 petition directly applies here too:

2 . . . The record demonstrates that this *Petitioner has not provided*
3 *sufficient specificity to determine whether the original project is*
4 *still environmentally acceptable and complies with applicable*
laws, ordinances, regulations, and standards (LORS).

5 (Commission Discussion, p. 3, italics added.)

6 **II. ABSENT SUMMARY DENIAL, GIVEN THE NEW EVIDENCE ELICITED IN**
7 **THE EASTSHORE PROCEEDINGS, MINIMALLY THE COMMISSION MUST**
8 **ASSIGN THIS PETITION FOR AN EVIDENTIARY HEARING TO WHETHER**
9 **EVIDENCE EXISTS TO MAKE THE NECESSARY FINDINGS UNDER SECTION**
10 **1769 (A)(3).**

11 As discussed above, based on the petition presented by the applicant, this petition facially
12 is inadequate and as a matter of law may not be granted given the limitations of section 1720.3.
13 However, even assuming the petition was not barred by the express provisions of section 1720.3,
14 and the Commission wished to exercise its discretion to entertain the petition, it must “assign the
15 matter for further hearing” under section 1769 (a)(3).

16 Under section 1769, upon receipt of such a petition, staff has two options. Under
17 subdivision (a)(2),

18 Where staff determines that there is *no possibility that the*
19 **modifications may have a significant effect on the environment,**
20 and if the modifications will not result in a change or deletion
21 of a condition adopted by the commission in the final decision
22 or make changes that would cause the project not to comply
23 with any applicable laws, ordinances, regulations, or standards,
24 no commission approval is required and the *staff shall file a*
25 *statement that it has made such a determination with the*
26 *commission docket and mail a copy of the statement to each*
27 **commissioner and every person on the post-certification mailing list.**

28 (Emphasis and italics added.) Under subdivision (a)(2), “**any person may file an objection to**
29 **staff's determination within 14 days of service on the grounds that the modification does not**
30

31 similar complaint by many to the Russell amendment proceedings, as initiated by Mr. Robert
32 Simpson is “frivolous.”

1 ***meet the criteria in this subsection.***” (Italics and emphasis added.) Given the absence of staff’s
2 statement, presumably staff is not proceeding under subdivision (a)(2) of section 1769.

3 Under subdivision (a)(3),

4 If staff determines that a modification does not meet
5 the criteria in subsection (a)(2), **or if a person objects**
6 **to a staff determination that a modification does meet**
7 **the criteria in subsection (a)(2), the petition must be**
8 **processed as a formal amendment to the decision and**
9 **must be approved by the full commission at a noticed**
10 **business meeting or hearing. The commission shall issue**
11 **an order approving, rejecting, or modifying the petition**
12 **at the scheduled hearing, unless it decides to assign the**
13 **matter for further hearing before the full commission**
14 **or an assigned committee or hearing officer. The**
15 **commission may approve such modifications *only if it***
16 ***can make the following findings:***

17 (A) the findings specified in section 1755 (c), and (d), if
18 applicable;

19 (B) that **the project would remain in compliance with all**
20 **applicable laws, ordinances, regulations, and standards,**
21 **subject to the provisions of Public Resources Code section**
22 **25525;**

23 (C) **that the change will be beneficial to the public, applicant, or**
24 **intervenors; and**

25 (D) **that there has been a substantial change in circumstances**
26 **since the Commission certification justifying the change or that the**
27 **change is based on information which was not known and could not**
28 **have been known with the exercise of reasonable diligence prior to**
Commission certification.

Here, since this Commission’s approval of the applicant’s amendment no. 1, the
Evidentiary Committee took testimony and evidence concerning the application of the Eastshore
Energy Center, Docket No. 06-AFC-6. Although Group Petitioners, the County and Chabot-Las
Positas College District sought to intervene in the Russell amendment proceeding, those petitions
were denied and these parties were unable to offer evidence in the Russell one amendment
proceeding. However, these parties were able to present evidence as to Eastshore which Group

1 Petitioners submit equally applies to Russell. Additionally, one of the FAA witnesses called
2 solely by Group Intervenors in Eastshore was the FAA District Manager, Andy Richards, of the
3 San Francisco Air Traffic Control District, whose division was not contacted for comments
4 concerning Russell's amendment one.

5 As Mr. Richards December 18, 2007 letter and testimony given in Eastshore reflects, a
6 copy of which Group Objectors take administrative notice, in order to restrict federal airspace, one
7 must apply to the FAA and that application must satisfy the requirements of NEPA. Neither of
8 those requirements has been met in Russell. Although the Committee's proposed decision
9 recommends denial for Eastshore, in that proposed decision, the Committee attempts to
10 distinguish the hazards created by Eastshore from Russell by stating that the "Commission's
11 RCEC Decision determined that no flight paths would be affected by restricting the airspace above
12 the RCEC. ([Citation].) The EEC is much closer to the existing air traffic pattern and more
13 aircraft fly over the area, requiring pilots to be concerned about other traffic, as well as potential
14 turbulence from stack exhaust." (EEC proposed decision, p. 361 & fn. 119.)

15
16 Group Objectors disagree and submit that there is substantial evidence establishing that
17 flight paths would be affected by restricting the airspace above the RCEC and is ready and
18 prepared to present supporting evidence. Additionally, the exhaust plume of RCEC is twice as
19 high extending to 1,000 feet in elevation approaching Oakland's airspace designated at 1,300 feet
20 and plant is five times larger in its power generation therefore likely increasing its plume velocity.

21 This evidence also establishes the applicability of section 1755, subdivisions (c) and (d)
22 which provides the following:
23

24
25 **(c) The commission shall not certify any site and related**
26 **facilities for which one or more significant adverse**
27 **environmental effects have been identified unless the**
28 **commission makes both of the following findings:**

(1) With respect to matters within the authority of the

1 commission, that changes or alterations have been required
2 in, or incorporated into, the project which mitigate or avoid the
significant environmental effects identified in the proceeding.

3 **(2) With respect to matters not within the commission's**
4 **authority but within the authority of another agency, that**
5 **changes or alterations required to mitigate such effects have**
6 **been adopted by such other agency, or can and should be**
7 **adopted by such other agency.**

8 **(d) If the commission cannot make both the findings**
9 **required under subsection (c), then it may not certify the**
10 **project unless it specifically finds both of the following:**

11 (1) That specific economic, social, or other considerations make
12 infeasible the mitigation measures or project alternatives identified
13 in the application proceeding; *and*

14 (2) That the benefits of the project outweigh the unavoidable
15 significant adverse environmental effects that may be caused
16 by the construction and operation of the facility.

17 Additionally, as reflected by the proposed decision in Eastshore requiring supplemental
18 testimony scheduled to take place on July 21, 2008, the California Air Resource Board has issued
19 new and important rules and requirements to protect air quality and public health which absent this
20 Commission's denial or appointment of an evidentiary committee, this project improperly escapes
21 contrary to the requirements of Title 20 of the California Code of Regulations.

22 **III. JOINDER IN ALAMEDA COUNTY'S OBJECTIONS**

23 Group Objectors further join in the Objections and Comments by Alameda County served
24 on June 30, 2008.

25 Dated: July 1, 2008

26 _____
27 Jewell J. Hargleroad
28 Attorney for Group Objectors California
Pilots Association, San Lorenzo Village
Homes Association and Hayward Area
Planning Association