

1 Jewell J. Hargleroad (SBN 130285)
2 Law Office of Jewell J. Hargleroad
3 1090 B Street, No. 104
4 Hayward, California 94541
5 (510) 331- 2975
6 jewellhargleroad@mac.com

7 Attorney for Group Objectors California
8 Pilots Association, San Lorenzo Village Homeowners
9 Association, and Hayward Area Planning Association

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

**OBJECTIONS TO STAFF COUNSEL'S
JULY 17 LETTER AND JULY 24, 2008
RECOMMENDATION TO GRANT
RCEC'S DEFICIENT AND BARRED
PETITION TO EXTEND
CONSTRUCTION DEADLINE A SECOND
TIME WITHOUT A REQUIRED
EVIDENTIARY HEARING**

Date: July 30, 2008
Location.: Sacramento
Time: 10 a.m.

1 **OBJECTIONS TO STAFF COUNSEL’S JULY 17 LETTER AND JULY 24, 2008**
2 **RECOMMENDATION TO GRANT RCEC’S DEFICIENT AND BARRED PETITION TO**
3 **EXTEND CONSTRUCTION DEADLINE A SECOND TIME WITHOUT A REQUIRED**
4 **EVIDENTIARY HEARING**

5 Group Objectors, the non-profit organizations of California Pilots Association, San
6 Lorenzo Village Homes and Hayward Area Planning Association, which sought to intervene in the
7 siting proceedings in 2007 and already submitted objections on July 1, 2008, further object to
8 attorney Kevin Bell’s July 17, 2008 letter to counsel and Mr. Bell’s July 24, 2008
9 “recommendation” to this Commission purportedly from “staff.” In this regard, Group Objectors
10 note that Mr. Bell is counsel and not staff qualified to provide this recommendation and further
11 object to this recommendation as inadequate.

12 Contained in both Mr. Bell’s July 17, 2008 letter and July 24, 2008 recommendation is
13 several misstatements of fact:

14 1. Mr. Bell’s July 17, 2008 letter Group Objectors counsel asserts that Group Objectors
15 “commented.” Group Objectors did not submit “comments.” Specifically, on July 1, 2008,
16 counsel submitted on behalf of these parties the following pleading:
17

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

20 **GROUP OBJECTORS DEMAND FOR EVIDENTIARY HEARING**

21 Group Objectors did not submit “comments” nor do Group Objectors “protest” as Mr. Bell urges
22 this Commission to erroneously find. **Group objectors object and demand an evidentiary**
23 **hearing on the basis that this project does not conform to the current LORs, the amendment**
24 **adopted purported “mitigations” which cannot be implemented, nor does RCEC even**
25 **contend that it presently complies with current LORs or state or federal law.**
26
27
28

1 2. Mr. Bell’s July 17, 2008 letter erroneously asserts Group Objects seek
2 “reconsideration.” This is incorrect. Group Objectors demanded and continue to demand that the
3 Commission follow section 1720.3, under which this petition is brought, and section 1769 of Title
4 20 of the California Code of Regulations under which the Commission’s *own notice* of receipt
5 docketed on Friday, June 13, 2008, concerning this application unambiguously states is required to
6 be followed:

7
8 **A request for a two-year extension of the deadline for the**
9 **commencement of construction of the Russell City Energy**
10 **Center (RCEC), signed under penalty of perjury by the project**
11 **owner, was submitted to the Energy Commission for review**
12 **and approval as required by Title 20, California Code of**
13 **Regulations, section 1769(b).**

14 (Emphasis and italics added.)

15 3. Mr. Bell’s July 17, 2008 letter misleadingly asserts that “None of the comments
16 received refute the petitioner’s statements regarding the appeals of the various project-related
17 decisions that have occurred. . . . *Nor have reasons been given to question the petitioner’s claim*
18 *that these appeals have impeded financing of the project . . .*”

19 Likewise, Mr. Bell recommends that this Commission approve a proposed order stating
20 that the “Commission received several public comments protesting the extension, but there was *no*
21 *evidence* refuting the petitioner’s statements and reasons supporting its request for the extension.”
22 First, Group Intervenors point out that this *petitioner has presented absolutely no evidence*
23 *whatsoever in support of its petition*. As confirmed by the docket for this proceeding, *there is no*
24 *declaration under penalty of perjury by any person with personal knowledge substantiating any*
25 *of these claims*. (See attached portion of docket.)

26 Likewise, this claim of needing additional time rings hollow. On July 25, 2007, in another
27 unverified petition, counsel for RCEC alleged the following:

28 2. The requested extension is necessary because the Project
Owner will not be able to commence construction by September

1 10,2007. **Prior to commencing construction, the following three**
2 **steps must be completed:** (1) The Project Owner must receive a
3 decision from the Commission approving Amendment #1,
4 (2) PG&E must secure a Certificate of Public Convenience and
5 Necessity ("CPCN") for construction of the transmission line
6 that will connect the Russell City Energy Center to PG&E's
7 transmission system, and (3) the Project Owner must complete
8 financing of the Project. These steps will not be completed by
9 September 10, 2007, **but are likely to be completed the last quarter**
10 **of 2007.** The Project Owner anticipates commencement of
11 construction in the first quarter of 2008.

12 (July 25, 2007 petition by Gregory Wheatland, pp. 1-2, para. 2.)

13 The petition continues, "**Once the CPCN is approved, project financing will be promptly**
14 **completed.**" (July 25, 2007 petition, p. 2, para. 4.) These statements directly contradicts these
15 present representations nor does this petition or RCEC's late "response" executed on July 25, 2007
16 address these inconsistencies. Additionally, given Robert Simpson's appeal of the to the
17 Environmental Appeals Board was filed on January 2, 2008, *after* the time which RCEC
18 represented it would be completed with these requirements, RCEC's alleged ability to complete
19 financing already was highly questionable and certainly not "impeded" by any appeals which had
20 not then been filed. Any evidentiary hearing should likewise examine the inconsistency of these
21 representations made on behalf of RCEC.

22 Likewise, the July 25, 2007 petition states that RCEC "has entered into a long-term Power
23 Purchase Agreement with PG&E and will commence construction . . . to support the commercial
24 operation date of June 1, 2010." Attached is a true and correct copy of a portion of the
25 administrative record before CPUC proceedings concerning PG& E's summary of the status of
26 this project, including the status of this purchase power agreement: "RCEC and PG& E initiated
27 negotiations and have reached agreement in principle to amend the RCEC PPA to revise the
28 pricing terms and extend the on-line date by two years. ***The amendment is conditioned on senior***
management or corporate approvals of both companies and CPUC approval, and will be
submitted to the CPUC for consideration within the next 30 to 60 days." (Emphasis & italics

1 added.) Nowhere is there any discussion of the status of these negotiations or the application by
2 PG&E in either the petition or RCEC's July 25, 2007 Response.

3 4. Contrary to Mr. Bell's representations, the petition does not claim that any "appeals
4 have *impeded* financing," petitioner has instead claimed that it "*must complete the financing* of the
5 RCEC Project." (Italics added.) In fact, the petition contends that the "threat of further vexatious
6 litigation may *continue to delay* completion of financing . . ." (Italics added.) In addition to these
7 multiple extensions as plainly excluded from section 1720.3, which our objections have demanded
8 be applied consistently with other petitions for extensions, this claim is refuted by RCEC's own
9 earlier July 25, 2007 petition that financing is conditioned on PG&E obtaining a CPCN. No
10 discussion of the status of that review is included in this petition at all.

11 5. Multiple parties have refuted these claims that the "threat" of litigation or inability to
12 "complete" financing is good cause or that the petitioner has established this point. RCEC's
13 petition is executed by an attorney, it not under penalty of perjury by a person with personal
14 knowledge laying any factual foundation. In addition to Group Objectors objections, the County
15 of Alameda's earlier objections made a thorough examination of "good cause" establishing the
16 ***Commission's legal obligation to hold an evidentiary hearing on whether "good cause exists."***
17 (See County's June 30, 2008 Demand for Evidentiary Hearing.)
18

19 4. The proposed order that Mr. Bell recommends the Commission adopt erroneously states
20 "there was no evidence refuting petitioner's statements and reasons supporting its request for the
21 extensions." Not only is this contradicted by this Commission's own records concerning RCEC's
22 inconsistent statements, but, there is no evidence to support RCEC's unverified allegations and b.
23 it is not objectors burden to present evidence nor has an evidentiary committee been appointed to
24 take evidence.
25

26 5. Under section 1769, upon receipt of such a petition, staff has two options. Under
27 subdivision (a)(2),
28

1
2 **Where staff determines that there is no possibility that the**
3 **modifications may have a significant effect on the environment,**
4 **and if the modifications will not result in a change or deletion**
5 **of a condition adopted by the commission in the final decision**
6 or make changes that would cause the project not to comply
7 with any applicable laws, ordinances, regulations, or standards,
8 no commission approval is required and the staff shall file a
9 statement that it has made such a determination with the
10 commission docket and mail a copy of the statement to each
11 commissioner and every person on the post-certification mailing list.

12 (Emphasis and italics added.) Group Objectors submit that no such determination to date has
13 been made by staff nor do the representations by Mr. Bell, a staff attorney, made on July 17 or
14 July 24, 2008 make such a determination.

15 Under subdivision (a)(2), “any person may file an objection to staff’s determination within
16 14 days of service on the grounds that the modification does not meet the criteria in this
17 subsection.” (Italics and emphasis added.) Insofar that Mr. Bell’s July 17, 2007 “letter” or his
18 July 24, 2008 recommendation is intended to constitute a staff statement falling within subdivision
19 (a)(2) of section 1769, on behalf of Group Objectors **this is to object to staff’s determination on**
20 **the ground that this petition’s modification does not meet the criteria of subdivision (a)(2) of**
21 **section 1769.**

22 Subdivision (a)(3) continues:

23 If staff determines that a modification does not meet
24 the criteria in subsection (a)(2), **or if a person objects**
25 **to a staff determination that a modification does meet**
26 **the criteria in subsection (a)(2)** [as Group Objectors,
27 the County and Chabot have], **the petition must be**
28 **processed as a formal amendment to the decision**
and must be approved by the full commission
at a noticed business meeting or hearing. The commission
shall issue an order approving, rejecting, or modifying the petition
at the scheduled hearing, unless it decides to assign the
matter for further hearing before the full commission
or an assigned committee or hearing officer. The
commission may approve such modifications only if it

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

can make the following findings:

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

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

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

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

In this regard, we submit that there is no evidence before the Commission enabling them to make these findings and we have established that the project does not remain in compliance with all applicable laws, ordinances, regulations, and standards subject to Public Resources Code section 25525, minimally requiring the assignment for an evidentiary hearing. Among the other points raised in our objections, before the Commission is a copy of the December 18, 2007 letter from the Federal Aviation Administration establishing that there is no authority for RCEC’s purported “mitigation” of “restricting airspace.”

6. We strongly disagree with and dispute Mr. Bell’s representations statement that the “certification of RCEC on September 26, 2007 . . . remains valid . . . and [t]hat certification [of amendment one] was based on an *exhaustive environmental review and extensive public hearings.*” (Emphasis and italics added.) Based on counsel for the Commission recommendations, the petitions to intervene by Group Objectors, the County of Alameda and Chabot-Las Positas College District were rejected and *our offer of proof and evidence were precluded.* Additionally, as acknowledged by RCEC’s counsel at the hearing on this amendment, these “amendment” proceedings were utilized as a justification not to provide notice. The only

1 “extensive” point of discussion of the public hearings was there was no proper public notice and
2 that the Commission should reopen the evidentiary record to allow those seeking to intervene to
3 offer evidence.

4 7. Attached is the supporting declaration of Jay White executed on July 20, 2008, in
5 support of Group Objectors Objections and Demand for an Evidentiary Hearing and in support of
6 these objections to Mr. Bell’s July 17, 2008 correspondence and July 24, 2008 recommendation on
7 behalf of staff.

8 8. Lastly Group Objectors object to RCEC’s 18 page “response” executed on Friday, July
9 25, 2008. This petition submitted without notice two business days prior to this hearing does not
10 provide any of the parties opposing this application any opportunity for review. Group Objectors
11 submit that RCEC’s representations should be examined by this Commission’s Evidentiary
12 Committee that should be appointed to examine RCEC’s petition.

13
14
15 Dated: July 29, 2008

Respectfully Submitted,

16 _____
17 Jewell J. Hargleroad
18 Attorney for Group Objectors California
19 Pilots Association, San Lorenzo Village
20 Homes Association and Hayward Area
21 Planning Association
22
23
24
25
26
27
28