STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Amendment to the Application for Certification of the Russell City Energy Center Project	))))	Docket No. 01-AFC-7C Order No. 08-924-06

DOCKET
01-AFC-7C
DATE SEP 24 2008
RECD. SEP 24 2008

ORDER DENYING PETITIONS FOR RECONSIDERATION CONCERNING EXTENSION OF CONSTRUCTION DEADLINE

I. Introduction and Summary

On July 30, 2008, the Energy Commission extended the previously-established one-year deadline for the start of construction of the Russell City Energy Center ("RCEC"), by approving an additional two years for construction to be commenced. (Docket No. 01-AFC-7C, Order No. 08-730-3 (July 30, 2008).) On August 27, 2008, petitions for reconsideration ("Petitions") of that decision were filed by two groups of interested persons: (1) Rob Simpson ("Simpson"), Californians for Renewable Energy ("CARE"), Hayward Area Planning Association, and Citizens Against Pollution ("the Simpson Petition"); and (2) CARE and Simpson ("the CARE Petition"). On September 3, 2008, we invited responses to the Petitions, and several were submitted. On September 24, 2008, we heard arguments at the Commission's regularly-scheduled Business Meeting. In this Order we deny both Petitions.

II. Legal Criteria

The Warren-Alquist Act and the Commission's regulations allow any party in a power facility proceeding to file a petition for reconsideration of a decision or order. (Pub. Resources Code, § 25530; Cal. Code Regs., tit. 20, § 1720, subd. (a).) A petition for reconsideration must specifically set forth either (1) new evidence that despite the diligence of the petitioner could not have been produced during evidentiary hearings on the case; or (2) a demonstration that the decision being challenged contains an error in fact or law, or that there has been a change in applicable law. (*Id.*, § 1720, subd. (a).)

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The Commission must grant or deny a petition for reconsideration within 30 days of its filing. (*Id.,* § 1720, subd. (b).) If the Commission does not grant the petition, the original determination stands. If the Commission grants the petition, that does not mean that the original decision is changed; rather, it simply means that the Commission then holds a subsequent hearing (which may include the taking of evidence), within 90 days, to consider whether to change the original determination. (*Id.,* § 1720, subds. (b)-(c).)

III. Standing of the Petitioners

As we noted above, the law allows a "party" in a power facility proceeding to file a petition for reconsideration. The Project Owner asserts that none of the petitioners are "parties," and, indeed, that achieving "party" status is legally possible only in notice of intention ("NOI") or application for certification ("AFC") proceedings, and not in a proceeding such as the instant one. Because we are denying the Petitions, we need not resolve that matter here. Instead, we will assume, without deciding, that the Petitions are properly before us.

IV. The Petitions

A. The CARE Petition

The CARE Petition does not indicate the name or address of the person submitting it, in violation of our regulations. (Cal. Code Regs., § 1209, subd. (b)(4).) For that reason alone we reject the Petition. Moreover, it raises no issues that are not also raised in the Simpson Petition, and our discussion of those issues, below, is applicable to both Petitions.

B. The Simpson Petition

The Simpson Petition appears to assert that:

(1) the Commission's deadline-extension decision failed to take appropriate account of the U.S. Environmental Appeals Board's ("EAB") recent remand of the project's Prevention of Significant Deterioration ("PSD") permit to the Bay Area Air Quality Management District ("BAAQMD");

(2) the Commission improperly noticed the July 30, 2008 hearing at which we granted the deadline extension;

(3) the alleged loss by the Commission of various materials allegedly submitted by the Mr. Simpson for the July 30 hearing prevented him from participating; and

(4) the Commission improperly ignored section 1769, subdivision (a)(1) of its regulations when granting the deadline extension.

We address each contention in turn.

1. The EAB Remand of the PSD Permit

The RCEC must obtain a "prevention of significant deterioration" ("PSD") air quality permit before construction may begin. Although PSD permits are federal permits, they are usually issued by local air districts that have been delegated the authority to issue them by the U.S. Environmental Protection Agency "EPA"). (See *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.) That was so here, where RCEC's PSD permit was issued by the Bay Area Air Quality Management District "BAAQMD").

Petitioner Simpson appealed the RCEC's PSD permit to U.S. EPA's Environmental Appeals Board ("EAB"), which recently remanded the permit to BAAQMD. Indeed, it was the existence of the appeal that led the Energy Commission to grant the construction deadline extension to the RCEC on July 30.

The Commission's certificate is a state permit. However, as is required by state law, in granting the RCEC certificate we found that the project would comply with all applicable federal laws, including those relating to the PSD permit. We did so both in granting the certificate originally in 2002, and in amending the certificate in 2006. (See Docket No. 01-AFC-7C, Order No. 07-0926-04, p. 85, Finding 2, & Condition AQ-SC6.)

The Simpson Petition asserts that our extension of the construction deadline is inconsistent with EAB's remand of the PSD permit. (See Petition, pp. 3 - 7.) That is not so. First, when we found that the RCEC would be consistent with substantive PSD requirements, we clearly contemplated that the PSD permit would be obtained

after our certification (but before construction). (See Docket No. 01-AFC-7C, Order No. 07-0926-04, p. 85, Finding 2, & Condition AQ-SC6.) Nothing about the EAB appeal or remand changes that: the PSD permit will still need to be obtained prior to the commencement of construction. Second, EAB's remand is not a denial of the PSD permit, it is merely a continuation of the permit process. We have no reason to believe that BAAQMD will not re-affirm the PSD permit on remand or that the EAB will not ultimately uphold it, but if for some reason the PSD is not issued, our extension of the state permit will not change the status quo: construction still cannot begin without a valid PSD permit. Third, the time for challenging the Energy Commission's 2002 certificate for the RCEC, and the 2006 amendment, has long since passed. (See Pub. Resources Code, § 25531.) The challenge to a *federal* permit in a separate forum does not disturb the Commission's certification authority under state law, invalidate our state certificate, or preclude the Commission from using its authority to extend the construction deadline that exists in the state certificate. We found good cause to grant an extension on July 30, and nothing in the Petition changes that.

The Petition also refers to asserted problems with BAAQMD's notice of its PSD hearing. Obviously, any such issues would be irrelevant to the propriety of our proceedings.

2. Notice of the July 30 Hearing

The Simpson Petition argues that the Commission improperly noticed the July 30 hearing. (Petition, pp. 7 - 12.) This argument fails for three reasons. First, the Petition discusses not the public notice of the hearing – i.e., the agenda for the July 30 Business Meeting (see Gov. Code, § 11125, subds. (a)-(b)) – but rather a "Notice of Receipt" of the request for an extension. Second, the Petition appears to assert that the "Notice of Receipt" was improper because it refers to section 1769 of the Commission's regulations (see Petition, pp. 7 - 9), but the Petition itself also argues that "[t]he Extension of the Construction is . . . subject to review under 1769(a)(1)" (*id.*, p. 14; see also *id.*, p. 3). Petitioners cannot have it both ways. Third, the actual notice of the July 30 hearing was entirely adequate. The agenda item was as follows:

> 3. RUSSELL CITY ENERGY CENTER (01-AFC-7C). Possible approval of Russell City Energy Company LLC's petition to extend the deadline for commencement of construction of the Russell City Energy Center in Hayward, California from September 10, 2008, to September 10, 2010. Contact: Kevin Bell and Mary Dyas. (30 minutes)

This was more than sufficient to comply with legal requirements. The Open Meeting Act simply requires that state agency meeting agendas contain "a brief general description" of each item to be considered, which "generally need not exceed 20 words." (Gov. Code, § 11125, subd. (b).) The Commission provided clear notice that it would consider a petition for extension of the RCEC construction deadline. No more than this was required, and it was obviously sufficient to allow Mr. Simpson to have actual notice that the Commission would hear this matter at that time because he did appear at the Commission's business meeting and provided information about the EAB decision of July 29th. If there was any technical defect in the "Notice of Receipt," it did not prejudice Mr. Simpson in any way.

3. Mr. Simpson's Participation in the July 30 Hearing.

Mr. Simpson submitted a large amount of material to the Commission before the July 30 hearing. Apparently some of the material, including all of Mr. Simpson's arguments to EAB, was misplaced, and it might not have been available to all Commissioners before the hearing. (See Petition, pp. 13 - 14.) Even assuming that this was true, however, Mr. Simpson seems not to have been hampered in his participation. (See *idem*; see also para. 2, immediately above.) Moreover, the Petition indicates that the temporarily-missing material dealt with the EAB's remand of the PSD permit (*id.*, p. 14 ["what you didn't receive was the bulk of the EPA appeal"]) which, as we have discussed above, is irrelevant to our determination on the construction deadline. In sum, there was no error here.

4. The Applicability of Section 1769.

The Petition argues that the Energy Commission should have reviewed the construction deadline extension under section 1769, subdivision (a)(1) of our regulations. (Petition, pp. 14 - 15.) That provision authorizes "modifications . . . to the project design, operation, or performance requirements" that have been established in the Commission's final decision on a project. (Cal. Code Regs., tit. 20, § 1769, subd. (a)(1).) It is doubtful that a construction deadline is a "project design, operation, or performance requirement[]," so it is unlikely that section 1769, subdivision (a)(1) is applicable at all. Moreover, even if it were nominally applicable, it would be superseded by section 1720.3, which deals expressly with construction deadlines:

> Unless a shorter deadline is established pursuant to [Pub. Resources Code] § 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

(Cal. Code Regs., tit. 20, § 1720.3.) A specific provision relating to a particular subject, such as section 1720.3, controls that subject as against a more general provision, such as section 1769, even if the general provision is broad enough to include the subject to which the more specific provision relates. (See, e.g., *People v. Superior Court* (2002), 28 Cal.4th 798, 808.)

V. Conclusion

The Petitions present no new evidence, nor do they demonstrate that there was an error in fact or law, or that there has been a change in applicable law. Therefore, the Petitions lack merit under our regulations (Cal. Code Regs., tit. 20, § 1720, subd. (a)), and they are denied.

September 24, 2008

Energy Resources Conservation
and Development Commission

(ABSENT)
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Chairman

JAMES D. BOYD
Vice-Chair

Art Rosenfeld
ARTHUR H. ROSENFELD, Ph.D.
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JEFFREY D. BYRON
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Commissioner

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:

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DECLARATION OF SERVICE

I, Lynn Tien-Tran, declare that on September 24, 2008, I deposited copies of the attached **ORDER DENYING PETITIONS FOR RECONSIDERATION CONCERNING EXTENSION OF CONSTRUCTION DEADLINE** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

AND/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.

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

Lynn Tien-Tran