

DOCKET

01-AFC-20

DATE May 23 2006

RECD. May 23 2006

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:

Application for Certification
for the AVENAL ENERGY PROJECT

Docket No. 01-AFC-20

**ENERGY COMMISSION STAFF'S OPPOSITION TO FEDERAL POWER
AVENAL, LLC'S PETITION TO RESUME THE APPLICATION FOR
CERTIFICATION REVIEW PROCESS**

I. Background

On October 9, 2002, one month after staff issued its Preliminary Staff Assessment, Duke Energy Avenal requested that the review of the Avenal Energy Project (Avenal) be suspended for six months. That request and three subsequent one-year suspension requests were granted. On May 8, 2006, the committee overseeing review of the Avenal Application for Certification (AFC) denied Federal Power Avenal, LLC's (applicant) fifth request to continue suspension of the review of Avenal's AFC and granted Energy Commission staff's motion to terminate the proceeding. On May 19, 2006, the applicant filed a Notice of Intent to Complete Permitting and Opposition to Committee Proposed Order to Terminate the Application for Certification Proceeding (Notice of Intent). It should be noted that while the applicant frames its filing as a Notice of Intent to Complete Permitting, the order suspending review of the proceeding requires the applicant to petition the Committee to resume the AFC proceeding, and not just simply notify the Committee of its intent. The applicant does not have an automatic right to resume pursuit of a license, but must seek and receive permission from the Committee for review of the project to recommence. As

discussed further below, the Commission should uphold the Committee's order terminating the Avenal AFC proceeding.

II. The Applicant Has Not Timely Filed Its Request To Resume Review And Has Not Complied With The Conditions In The Order Suspending Review.

The April 25, 2005 order granting the applicant another one-year suspension clearly set forth several conditions with which the applicant was required to comply. Before the end of the suspension period, May 1, 2006, the applicant was required to report on the status of the record as reflected in a supplement to the AFC and file a proposed schedule for completing case review. The order also granted the applicant the opportunity to petition the Committee to resume the AFC review process "at any time *during the suspension period.*" (Order Suspending AFC Review to May 1, 2006 [italics added].) The applicant did not file its notice of intent to complete permitting until almost three weeks after the suspension order had expired. As for satisfaction of the other requirements, the applicant is not planning on filing any assessment of the record until the end of July and gives no indication as to when it would be prepared to file a proposed schedule. (Notice of Intent, p. 2.)

III. There Is No Indication That Any Progress Has Been Made On Those Items For Which Suspension Was Originally Requested, And The Passage Of Time Has Made The Project Less Viable.

The Commission may terminate an AFC proceeding where an applicant has failed to pursue an application with due diligence. (Cal. Code Regs., tit. 20, §1720.2.) The applicant claims that being in suspension, in and of itself, satisfies the requirement for due diligence, but does not cite any authority to support this contention. The Commission itself has never stated this view, which runs counter to the Commission's efforts to ensure that projects are sited and on-line as quickly as possible.

In fact, when the applicant originally requested a six-month suspension in 2002, it promised that such a suspension would allow it to begin an environmental analysis of any new interconnection proposed pursuant to PG&E's Supplemental System Impact Study and would allow the San Joaquin Valley Air Pollution Control District to complete a Final Determination of Compliance (FDOC). There is no indication that either of these promised events have occurred.

To the contrary, instead of progress being made on Avenal, events have occurred that make the proposed project even less viable from staff's perspective than when it was first suspended. The applicant proposes to use water from the California Aqueduct, with a backup supply from groundwater pumped through agricultural wells in the vicinity of the site. Staff viewed the proposal as problematical and thought the applicant had chosen a poor location because of its reliance on California Aqueduct water but did not oppose this approach in the Preliminary Staff Assessment because of the project's remote location, the apparent lack of a reclaimed water supply, and the fact that staff's position on the use of fresh water was still evolving without clear guidance from the Commission.

Since this project was filed and suspended, however, the Energy Commission issued the 2003 Integrated Energy Policy Report (IEPR) clearly explaining the extremely limited circumstances under which fresh water use by power plants would be approved. Subsequent to Avenal's suspension and issuance of the 2003 IEPR, the Tesla Power Plant Project (01-AFC-21), which was similarly proposing to use water from the California Aqueduct, was required instead to use reclaimed water. (Tesla Power Project Commission Decision, p. 8.) Consistent with the Commission's decision in Tesla, it would be staff's intention, should this project proceed, and based upon what we know today, to recommend that Avenal use dry cooling and that the Commission not certify the project unless it complies with the 2003 IEPR policy on power plant cooling.

Despite the applicant's assertions otherwise, it does not appear that this project is ready to resume review at this time. In its Notice of Intent, the applicant proposes to provide its initial assessment of the record at the end of July and to meet with staff "shortly thereafter." (Notice of Intent, p. 2.) There is no indication as to how many months it will take to provide the information identified in the assessment. The applicant has apparently not even kept in contact with the consultants who originally worked on the AFC. (Notice of Intent, p. 2.) It is not in the public's interest to spend the money and effort necessary to process this deficient application, first filed in 2001, just so the applicant may avoid paying a \$250,000 filing fee, especially in light of the many projects staff is expecting over the next several months.

IV. The Committee Did Not Commit Any Error In Issuing Its Order Terminating Proceeding.

In its filing, the applicant claims that in issuing the Committee Order Terminating Proceeding, the Committee acted prematurely and failed to comply with the Commission's regulations, thus requiring that the Commission reject the Committee's order. (Notice of Intent, p. 4.) The applicant cites to sections 1716.5 and 1720.2 for its contention that parties are entitled to a certain period of time to respond to motions. Neither section, however, requires the Committee to wait any predetermined time before it can act. Section 1716.5 simply requires parties to respond to motions, if they so choose, within 15 days unless the presiding member specifies otherwise. It does not mandate that a Committee must wait this amount of time before acting. Similarly, section 1720.2 allows the Committee the option of holding a hearing on a motion to terminate an AFC proceeding but does not mandate that one must be held before a Committee can issue an order. In fact, section 1720.2 allows the Committee to terminate an AFC proceeding on its own motion without entertaining any comments. Nevertheless, the Committee provided all parties the opportunity to comment on its order by May 19, 2006, of which the applicant took full advantage.

The applicant's due process concerns are also addressed by the opportunity to further comment and present its case at the May 24, 2006 Energy Commission Business Meeting. Lastly, the Committee could have simply rejected the applicant's Request for Extension of Existing Suspension to May 1, 2007 and, thus, effectively terminated the proceeding without even entertaining staff's motion. Therefore, the Committee properly complied with all Energy Commission regulations in issuing its Committee Order Terminating Proceeding and the applicant's due process rights have not been violated.

V. If The Commission Decides to Grant The Applicant's Request to Resume Review, It Is Imperative That All Stale Information Be Refreshed Before Staff Can Proceed.

If the Commission grants the applicant's request to resume review of the Avenal AFC, despite its staleness, the applicant should be required to identify and update all stale information. Staff has initially identified the following key items that must be updated before staff's review can recommence:

- A complete description and environmental analysis of the project's proposed interconnection with the Gates Substation, including PG&E's Supplemental System Impact Study, all necessary biological and cultural resources surveys and proposed mitigation measures for the proposed new 6-mile transmission line, and an environmental analysis of any necessary reconductoring.
- A new and updated Preliminary Determination of Compliance from the San Joaquin Valley Air Pollution Control District and evidence that USEPA agrees that the project meets Best Available Control Technology and the emissions offset package proposed is satisfactory.
- A complete description of a water supply or cooling technology in keeping with the State's water policy as described in the 2003 IEPR, including, where relevant, a will-serve letter from established supplier(s).

- A Biological Assessment from the United States Fish and Wildlife Service, the status of federal agency consultation and the identification of habitat compensation and evidence that such compensation has been approved by both USFWS and CDFG.
- A draft biological resources mitigation implementation and monitoring plan.
- Sufficient heat balance information for the cooling tower to enable staff to complete its visible plume analysis.
- A detailed and comprehensive analysis of what changes have occurred to the project, the project setting, and all applicable LORS since suspension was first granted on October 10, 2002, and how these changes affect the project's conformance with LORS and environmental impacts.

The above provides an idea as to the major items that would require supplemental information and is not intended to limit what the applicant must ultimately supply upon resumption of project review. If the Commission grants the applicant's petition to resume, despite staff's support of the Committee's Order Terminating Proceeding, staff would meet with the applicant to finalize the exact information to be provided. If resumption of the proceeding is granted, staff recommends that the Commission order that all supplemental information be provided no later than September 24, 2006, and that the failure to so provide by that date results in automatic and final termination of the Avenal AFC (01-AFC-20) review.

VI. Conclusion

For the reasons discussed above, staff recommends that the Committee Order Terminating Proceeding be upheld.

DATED: May 23, 2006

Respectfully submitted,

LISA M. DECARLO
Senior Staff Counsel

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

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Docket No. 01-AFC-20

PROOF OF SERVICE
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* * * *

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DECLARATION OF SERVICE

I, Julie Mumme, declare that on May 23, 2006, I deposited copies of the attached ENERGY COMMISSION STAFF'S OPPOSITION TO FEDERAL POWER AVENAL, LLC'S PETITION TO RESUME THE APPLICATION FOR CERTIFICATION REVIEW PROCESS in the United States mail at Sacramento, CA with first class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I declare under penalty of perjury that the foregoing is true and correct.

[signature]

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