

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:)	DOCKET NO. 98-SIT-7
)	
AES SOUTH CITY, LLC)	COMMISSION DECISION
Petition for Jurisdictional Determination)	
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COMMISSION DECISION

JANUARY 1999

**CALIFORNIA
ENERGY
COMMISSION
P800-99-002**

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:)	Docket No. 98-SIT-7
)	
AES South City, LLC)	COMMITTEE PROPOSED DECISION
Petition for Jurisdictional Determination)	RE: NOI EXEMPTION
)	
_____)	

I. THE PROJECT

AES South City, LLC (Petitioner) proposes to construct and operate a 515 megawatt (MW) natural gas-fired combined cycle power plant that is a market-based response to the creation of the California Power Exchange (PX). The proposed project will be located in San Mateo County in the city of South San Francisco, one mile east of Highway 101 and one mile north of the San Francisco International Airport. Petitioner will participate in the competitive electricity marketplace and expects to sell all or some of the project's electricity output through the PX and/or the California Independent System Operator (ISO).

II. PROCEDURAL HISTORY

On November 20, 1998, Petitioner filed a "Petition for Jurisdictional Determination" requesting that the Commission find the proposed AES South City Power Project eligible for an exemption from the Notice of Intention (NOI) requirements of Public Resources Code (PRC) section 25502. Petitioner asserts that its project conforms with the provisions of Public Resources Code (PRC) section 25540.6(a)(1) which exempts certain power plant projects from the NOI process.

On November 4, 1998, the Commission adopted specific findings in the *Blythe Energy* Decision as precedential for NOI exemption proceedings.¹ In that Decision, the Commission also indicated that Petitions for NOI exemptions may be reviewed on the basis of sworn testimony in lieu of evidentiary hearings. As an attachment to its Petition, AES South City submitted sworn responses to certain questions enumerated in *Blythe Energy* and asked of similarly situated Petitioners. (Attachment A to the Petition).

By Notice dated December 10, 1998, the Energy Facility Siting Committee scheduled a hearing on the Petition before the full Commission at its January 6, 1999 Business Meeting. In accord with Commission regulations,² the Committee served the Notice and Petition upon the individuals, organizations, and businesses identified by Petitioner as "interested parties," as well as upon other persons and entities appearing on pertinent mailing lists. The Notice directed Commission staff and all entities wishing to participate in the proceeding to file written statements by December 18, 1998. Commission Staff filed a statement pursuant to the Notice.

The December 10th Notice also stated that Petitioner's sworn responses would serve as testimony in the matter and pending further notification of the parties, the Committee would not require additional evidence prior to the January 6th hearing.

On December 21, 1998, the Committee issued this Proposed Decision which is based on the testimony filed by Petitioner, as well as the statement submitted by Staff. The Proposed Decision was served on Petitioner and all interested parties for review and comment prior to the Commission's January 6th hearing on the matter.

¹ Docket No. 98-SIT-2; CEC Publication No. P800-98-004.

² Cal. Code of Regs., tit. 20, § 1232.

III. APPLICABLE LAW

A. Statutory Requirements.

Public Resources Code section 25502 provides in pertinent part that:

Each person proposing to construct a thermal power plant...shall submit to the commission a notice of intention [NOI] to file an application for the certification of the site and related facility or facilities.³

The purpose of the NOI is to provide an open planning process in which the project proponent, interested agencies, and members of the public have an opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for a proposed project. (Cal. Code of Regs., tit. 20, § 1721). The NOI process also reviews whether a proposed project conforms with the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, § 25502).

Successful completion of the NOI process is a prerequisite to the second stage of power plant licensing, i.e., the Application for Certification (AFC). Public Resources Code section 25540.6, however, *exempts* certain projects from the NOI process and allows them to proceed directly to the AFC stage.⁴ Projects eligible for this expedited licensing process include:

...a thermal power plant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... . (PRC, § 25540.6(a)(1).)⁵

³ The Commission generally has 12 months from the time an NOI filing is accepted in which to conduct this review. (PRC, § 25516.6(a).)

⁴ The AFC process anticipates a *final* licensing decision within 12 months of filing an application. See, PRC, § 25540.6(a).

⁵ PRC, § 25540.6 lists several specific NOI exemptions that include: cogeneration, solar, modification of a

Petitioner contends its proposed project fits within this provision.

B. Policy Guidance.

The Commission has authority to interpret pertinent statutory or regulatory provisions. Typically, such Commission policy is expressed in its biennial Electricity Report (*ER*), the most recently adopted of which is controlling for power plant proposals filed during an *ER*'s operative life. (PRC, §§ 25309 and 25523(f)). In the present instance, this guidance appears as part of the 1996 *ER* in which the Commission stated:

For gas-fired power plants which are the result of competitive solicitations or negotiations, we will continue our process [announced in the Addendum to *ER 94*] for granting exemptions from NOI requirements to such projects. (*ER 96*, p. 75, Endnote 1).

The policy expressed in *ER 94* and the Addendum to *ER 94* supported the development of a competitive market in the production and sales of electricity. The Addendum clarified Commission policy on legislation amending Section 25540.6 to allow NOI exemptions for natural gas-fired projects that are “the result of a competitive solicitation or negotiation.” (AB 1884; Statutes of 1993).⁶ In the Addendum, the Commission expressed its preference for a “...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'.”⁷ In *ER 96*, the Commission expanded the views contained in *ER 94* and the *ER 94* Addendum to encourage the

specific facility, site specific, less than 100 MW, and demonstration projects.

⁶ The Legislative Counsel's Digest for AB 1884 states that the amendments were intended to change the statute to conform to the present-day competitive marketplace of energy development. "...[T]he siting provisions of the Act were written at a time when large baseload power plants were the types of plants being considered by the Commission and when competition between utilities and second party power producers was nonexistent." (Leg. Counsel's Digest, Bill Analysis for AB 1884, Third Reading, April 12, 1993). At the time AB 1884 was adopted, the federal Public Utilities Regulatory Policy Act (PURPA) and other related state laws had established a process (Biennial Plan Report Update or BRPU) to allow regulated public utilities and independent power producers to compete in the marketplace through a competitive bid process in order to meet demand. (*Ibid.*; 8/27/93 Senate Analysis).

⁷ *ER 94* Addendum, Revision 1, p. 2.

development of merchant power plants that participate in the newly emerging electricity marketplace without the benefit of ratepayer guarantees. (*ER 96* at pp. 71-72). Until the *Blythe Energy* Decision was issued, formal Commission policy on NOI exemptions was limited to these Electricity Reports.⁸

C. Precedential Decision

In *Blythe Energy*, the Commission further interpreted the scope of its policies pertaining to NOI exemptions, and determined that a natural gas-fired merchant project which proposes to sell its power in the competitive electricity market, and does not put ratepayers at risk, would generally be eligible for an NOI exemption. The Commission declared the following Findings as *Precedent*:⁹

- 1) The Commission adopted an “Addendum to the 1994 Electricity Report” on February 14, 1996.
- 2) This Addendum sets forth policies and procedures which apply to the interpretation of Public Resources Code (PRC) section 25540.6(a)(1) and are, on a case-by-case basis, specifically applicable to individual Petitions seeking an exemption from the Notice of Intention (NOI) provisions of PRC, § 25502.
- 3) The Commission adopted the 1996 Electricity Report (*ER*) which continued the policies set forth in *ER 94* and in the Addendum.
- 4) The California Power Exchange (PX) was created by AB 1890 to provide an efficient “competitive auction” open to all power producers, resulting in competitive market pricing at no risk to ratepayers. (Pub. Util. Code, § 355).
- 5) The creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations, which are of the type reasonably envisioned by the policy expressed in the Addendum and PRC, § 25540.6(a)(1).
- 6) The PX market, which began the competitive auction on March 31 1998, replaced the solicitation process that existed under the Biennial Report Plan Update (BRPU).

⁸ See, *Blythe Energy*, pp. 3-6 for a more complete discussion of the NOI exemption policies contained in *ER 94* and *ER 96*.

⁹ *Blythe Energy*, pp. 18-19.

In addition, the Commission found that power sales to the PX are the “result of a competitive solicitation or negotiation for new generation resources” within the meaning of PRC, § 25540.6(a)(1).¹⁰ This finding includes natural gas-fired projects that sell power to other power exchanges and/or wholesale, and/or retail marketers, and/or direct access power markets, and/or other power consumers.¹¹

IV. EVIDENCE OF RECORD

The *Blythe Energy* Decision provides that a petitioner may establish eligibility for an NOI exemption by filing sworn testimony in response to certain specific inquiries enumerated in that Decision.¹² In subsequent NOI exemption cases, the Committee directed petitioners to respond to the following inquiries under penalty of perjury in lieu of evidentiary hearings.¹³

1. Provide evidence to establish that Petitioner’s prospective project is “the result of a competitive solicitation or negotiation.”
2. Describe the specific nexus between the particular project proposed by Petitioner and the PX's solicitations for “day ahead” and “hourly bids”. How is the proposed project anticipated to perform under both scenarios regarding its baseload and peaking capacities?
3. Is Petitioner negotiating with any other potential power purchasers or power exchanges?
4. What is Petitioner's registration status at the PX? If Petitioner has not begun the registration process, what are Petitioner's plans regarding registration and negotiation for a “PX Participation Agreement?”

¹⁰ Commission Order adopting *Blythe Energy* (Order No. 98-1104-04); see also, *Blythe Energy*, pp. 17-18.

¹¹ *Ibid.*

¹² *Id.*, fn. 27 at p. 18.

¹³ See, e.g., *Three Mountain* (Docket No. 98-SIT-3); *Otay Mesa* (Docket No. 98-SIT-4); *Delta Energy* (Docket No. 98-SIT-5).

5. Identify Petitioner's principal corporate owners and/or other entities or individuals who are legally and financially responsible for the development, construction, and operation of the proposed project.
6. Describe Petitioner's experience and assets with regard to power generation acquisition, and power plant development, ownership, and operation.
7. Describe the specific location where the project will be constructed, and describe Petitioner's site selection criteria that led to this particular site location.
8. Provide evidence describing the project components sufficiently to establish that the proposed facility is a natural gas-fired power plant.
9. Provide evidence to establish that the proposed project can be developed and operated without the benefit of ratepayer support or guarantees.
10. Explain how Petitioner's negotiations may be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner. AES South City submitted sworn responses to the above-listed inquiries as Attachment A to its Petition, thus expediting the Committee's review process.¹⁴ The responses were executed under penalty of perjury by Scott A. Gardner, Vice President of AES South City. The Committee reviewed the sworn responses and based its Findings and Conclusions upon those submittals, in lieu of an evidentiary hearing.

Staff. Staff agreed with Petitioner's assertions that its proposed merchant project is a natural gas-fired power plant that meets the statutory test for being the result of a competitive solicitation. (Staff Statement filed December 16, 1998). Staff expressed its belief that existing Commission policy and previous NOI exemption cases support such a conclusion.¹⁵ (*Ibid.*)

¹⁴ By submitting its responses with the Petition, AES South City eliminated an extra step in the review process. In the cases cited at fn. 13, *ante*, the Committee issued the inquiries in its Notices of Hearings which extended the time for petitioners to file their responses, and consequently, extended the time for Committee review.

¹⁵ Staff cites the Commission's Decisions in *Blythe Energy, supra*, and in *La Paloma* (98-SIT-1; CEC Publication No. P800-98-003), as well as *Three Mountain, supra*; *Otay Mesa, supra*; and *Delta Energy, supra*.

There were no other comments or other evidence filed in this matter.

V. FINDINGS and CONCLUSIONS

Based upon the precedent established in *Blythe Energy*, and in the absence of any contravening evidence, the Committee finds that Petitioner's proposed project is the "result of a competitive solicitation or negotiation" within the meaning of PRC, § 25540.6(a)(1).

Based on the totality of the record, we make the following findings and conclusions:

- 1) AES South City, LLC (Petitioner) filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the *ER 94 Addendum*, *ER 96*, and the *Blythe Energy Decision*, and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.
- 2) Petitioner proposes to construct a natural gas-fired combined cycle power plant, nominally rated at 515 MW (AES South City Power Project). Major equipment for the project is typical of natural gas-fired power plants, including a two or three unit combustion turbine facility fueled with natural gas. One unit will produce approximately 345 MW as a combined cycle facility; the other one or two units are planned as a simple cycle facility producing approximately 170 MW.
- 3) AES South, LLC is a special purpose limited liability company established by AES Corporation of Arlington, Virginia. AES Corporation anticipates that Sonat Energy Services, Inc., a subsidiary of Sonat, Inc., a natural gas company based in Alabama, will become a part owner of AES South, LLC. AES Corporation, with assets exceeding \$8 billion, owns or has an ownership interest in 90 power plants in 13 countries, with a cumulative output of 27,000 MW. AES Corporation has developed and/or financed eight power plant facilities in the U.S., including AES Placerita, a 120 MW natural gas-fired facility in Newhall, California. In 1998, AES purchased three natural gas-fired plants from Southern California Edison (SCE) with a total generating capacity of nearly 4,000 MW, which is sold into the PX.
- 4) The AES South City Power Project will be located on a six-acre site in San Mateo County, in the city of South San Francisco, approximately one mile east of Highway 101, and one mile north of the northern tip of the San Francisco International Airport.
- 5) Petitioner chose the site for its commercial/industrial zoning; distance from residences; proximity to fuel; electric transmission lines and water supply; and the locational benefits to San Francisco Bay Area and the San Francisco Peninsula.

- 6) As an efficient new local generator, the AES South City Power Project will compete for “reliability must run” (RMR) contracts solicited by the California Independent System Operator (ISO) to maintain electrical reliability and relieve congestion in the San Francisco Bay Area and the San Francisco Peninsula. The proposed project will also participate in the ISO’s ancillary services market, by competing for regulation services, spinning, non-spinning and supplemental reserves, voltage support, and black start capability.
- 7) The AES South City Power Project is a competitive merchant project that is not eligible for ratepayer support or guarantees.
- 8) The proposed project is a market-based response to the creation of the California Power Exchange (PX), and will be operated to sell some or all of its electricity output through the PX, the ISO, and other power exchanges.
- 9) The proposed project is designed to provide operating flexibility in response to the PX’s fluctuating “day ahead” and “hour ahead” bidding prices.
- 10) Petitioner will market power through an unaffiliated PX participant or directly by registering as a participant prior to the project’s commercial operation.

We conclude, therefore, that Petitioner’s proposed natural gas-fired power plant project is the "result of competitive solicitation or negotiation" for the sale of its electric power. Under these circumstances, and in light of the factors mentioned above and discussed elsewhere in this Decision, and based on the precedent established in the *Blythe Energy* Decision, the AES South City Power Project qualifies for an exemption from filing a Notice of Intention as set forth in Public Resources Code section 25540.6(a)(1).

Dated: _____

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

ROBERT A. LAURIE
Commissioner and Presiding Member
Energy Facility Siting Committee

DAVID A. ROHY, Ph.D.
Vice Chair and Associate Member
Energy Facility Siting Committee

APPENDIX A

EVIDENCE OF RECORD

STATE OF CALIFORNIA

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AES South City, LLC)	COMMITTEE PROPOSED DECISION
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EVIDENCE OF RECORD

<u>Date</u>	<u>Document</u>
November 20, 1998	Petition for Jurisdictional Determination filed by AES South City, LLC; Attachment A to the Petition, containing sworn responses to the inquiries enumerated in the precedential <i>Blythe Energy</i> Decision
December 16, 1998	Energy Commission Staff Statement filed by Energy Commission Staff

APPENDIX B

PROOF OF SERVICE LIST