

COMMITTEE PMPD CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification for) Docket No.
the Avenal Energy Project) 08-AFC-1
)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM B
1516 NINTH STREET
SACRAMENTO, CALIFORNIA 95814

WEDNESDAY, DECEMBER 2, 2009

1:57 P.M.

Reported - Deborah L. Baker
Transcribed - Margo Hewitt CET**00480
Contract No. 170-08-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Jeffrey Byron, Presiding Member

Karen Douglas, Chairperson, Associate Member

HEARING OFFICER AND ADVISORS

Gary Fay, Hearing Officer

Kristy Chew, Advisor

Galen Lemei, Advisor

STAFF AND CONSULTANTS PRESENT

Lisa DeCarlo, Senior Staff Counsel

Joseph Douglas, Project Manager

Rick Tyler

APPLICANT

Jane E. Luckhardt, Attorney
Nicholas H. Rabinowitsh, Attorney
Downey Brand Attorneys, LLP

Jim Rexroad, Vice President
Avenal Power Center, LLC

Gary S. Rubenstein
Sierra Research

Joseph L. Stenger
TRC Solutions

INTERVENOR

Rob Simpson (via teleconference)

ALSO PRESENT

Gabriela Torres, Interpreter

ALSO PRESENT

Jim Swaney (via teleconference)
San Joaquin Valley Air Pollution Control District

Melissa Whitten (via teleconference)
Harlan Casida (via teleconference)
City of Avenal

Rey Leon
San Joaquin Valley Latino Environmental
Advancement and Policy Project

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1 P R O C E E D I N G S

2 1:57 p.m.

3 PRESIDING MEMBER BYRON: We're going to
4 go ahead and begin. Good afternoon, everyone. We
5 are here for a discussion of the Presiding
6 Member's Proposed Decision on the Avenal Energy
7 Project. Today's hearing is being conducted by a
8 Committee of the Energy Commission on the proposed
9 Avenal Project, the application that they
10 submitted for certification.

11 The purpose of today's hearing is to
12 discuss the comments on the Presiding Member's
13 Proposed Decision or the PMPD, which were filed by
14 the applicant on November 30, 2009.

15 No timely comments have been received
16 from any other party in the case. And before we
17 begin I'd like to introduce the Committee to you.

18 I am Commissioner Jeff Byron, the
19 Presiding Member. My Advisor is Kristy Chew. The
20 Associate Member of this Committee is the Chairman
21 of our Commission, Karen Douglas; and her Advisor,
22 Galen Lemei.

23 I understand we have a translator in the
24 back of the room, and I'll just ask her if she
25 would raise her hand momentarily. Gabriela, I'm

1 sorry, I don't know your last name. But that's
2 just in case anyone needs to know who she is and
3 can approach her for assistance.

4 But I'm going to turn our hearing over
5 to our ever able Hearing Officer, Mr. Gary Fay.

6 HEARING OFFICER FAY: Thank you,
7 Commissioner Byron. I'd like to go over a few
8 preliminary things before we get started. Today's
9 hearing was announced by public notice sent out by
10 the Committee on November 10, 2009. And it gave
11 public notice of this Committee Conference, as
12 well as the upcoming business meeting on December
13 16th, at which time the full Commission will
14 consider the Presiding Member's Proposed Decision.

15 We've got a microphone system, you'll
16 see two mics at many of the stations. The small
17 short mic is that of the court reporter. It's
18 very important that that mic be close enough to
19 you. And it should remain on. On is toward you.
20 No need to mess with that except to insure that
21 it's close enough to your voice.

22 The longer mic, we can only have four on
23 at once. So I hope when people are not speaking
24 they'll just push the button and the light will go
25 off. And then we won't have any problems with the

1 PA system.

2 What we have put in the notice and
3 actually have set up now is a teleconference. And
4 we have some parties on there, so I hope they'll
5 be listening and we'll get around to calling on
6 them at various times.

7 I'd like to begin by taking
8 introductions, and start with the applicant.

9 MS. LUCKHARDT: I was going to say good
10 morning, but it's good afternoon. My name is Jane
11 Luckhardt and I'm representing the applicant. And
12 to my left is Jim Rexroad from (inaudible) Power
13 for Avenal Energy here.

14 And then we've got some other folks
15 behind us, that if they are speaking we'll have
16 them introduce themselves as they come up.

17 HEARING OFFICER FAY: And now the staff.

18 MS. DeCARLO: Lisa DeCarlo, Energy
19 Commission Staff Counsel. And to my right is Joe
20 Douglas, Energy Commission Project Manager for
21 this project. We also have Rick Tyler in the
22 audience in the event there are any questions
23 regarding the public health analysis.

24 HEARING OFFICER FAY: Thank you. Is
25 anybody present from Intervenor California Unions

1 for Reliable Energy, CURE? Or online, anyone on
2 the telephone? All right.

3 And how about Ingrid Brostrom for the
4 Center on Race, Poverty and the Environment, CRPE?
5 No indication.

6 How about the Tehipite Chapter of the
7 Sierra Club? Also an intervenor. Okay.

8 And I happen to know that we have Rob
9 Simpson on the line. Are you still there, Mr.
10 Simpson?

11 MR. SIMPSON: Yes, I am.

12 HEARING OFFICER FAY: Good. And I don't
13 believe we have anybody from the Public Adviser's
14 Office here. But what I will say is we have some
15 blue cards in the back. If anybody wants to make
16 a comment, put your name on the card and be sure
17 it gets delivered to me sometime during the
18 hearing; and we'll be sure you get called on,

19 All right, what I'd like to do, I'd like
20 to begin with asking the applicant if there's
21 anything further that they'd like to say in
22 addition to their written comments. They don't
23 need to repeat or summarize those written comments
24 that were filed on Monday. All the parties have
25 copies of those. But if there's anything further,

1 this is the time.

2 Ms. Luckhardt?

3 MS. LUCKHARDT: No, we don't have
4 anything further. We put our comments in the
5 written filing on Monday. And so you have those.
6 If there are any questions we're available to
7 respond to that.

8 HEARING OFFICER FAY: Great. Ms.
9 DeCarlo, does the staff have any reaction to the
10 applicant's comments?

11 MS. DeCARLO: No, they looked fine to
12 us. They didn't seem out of order or in
13 contravention to anything we have submitted.

14 HEARING OFFICER FAY: And I know that
15 you filed something on Monday just stating that
16 you would have no comments.

17 MS. DeCARLO: Right. We looked over the
18 PMPD and didn't have any concerns with anything
19 stated. It was in line with the evidence that we
20 had submitted, and that we believe the applicant
21 submitted, as well.

22 HEARING OFFICER FAY: Okay. And then
23 I'll ask Mr. Simpson if he wanted to comment on
24 what the applicant filed.

25 MR. SIMPSON: I've got some comments on

1 the proposed decision, sure.

2 HEARING OFFICER FAY: And why were those
3 not filed as required by the Committee order?
4 They had to be filed by 3:00 on Monday.

5 MR. SIMPSON: I intended to make my
6 comments here today.

7 HEARING OFFICER FAY: Okay, you
8 understand that --

9 MR. SIMPSON: Don't have an excuse.

10 HEARING OFFICER FAY: Yeah. You
11 understand that the Committee directed that those
12 comments be filed in writing. We'll certainly
13 listen to your comments, but the applicant and the
14 staff are at a disadvantage because they've not
15 had a chance to review them, although you've had a
16 chance to review their comments.

17 So I have to say, you know, your
18 comments are not timely for the record.

19 Yeah, let's go off record.

20 (Off the record.)

21 HEARING OFFICER FAY: Mr. Simpson, I've
22 given that caveat about your untimely filing, or
23 failure to file. But why don't you go ahead and
24 give us your reaction to the comments filed by the
25 applicant.

1 MR. SIMPSON: Okay. Sure. Some of the
2 concerns I have with the proposed decision. Well,
3 it appears that there's a number of considerations
4 that just haven't happened.

5 It started out this project will be
6 built on 34 acres of a 140-acre site -- 148-acre
7 site. Now what that appears is that you're
8 skipping the Subdivision Map Act to subdivide this
9 property into a parcel that puts you under the 40
10 acres that would have different considerations.

11 It's really 148-acre site. You can call it
12 34 acres, as you are, but that's not what it is.

13 The Warren Alquist Act has found a way
14 to get around the new source review provisions of
15 the Clean Air Act through the FDOC, the PDOC
16 process, which precludes review. Listing that in
17 appeals filed on FDOCs before and after Commission
18 decisions at air districts.

19 After Commission decision with the
20 Russell City Energy Center, the air district
21 contended they couldn't consider appeal because of
22 the Warren Alquist Act.

23 In Carlsbad before the Commission
24 decision the air board determined they couldn't
25 consider appeals of the FDOC before the

1 Commission's action.

2 So, when these actions aren't appealable
3 before or after, it was demonstrated that the air
4 board violated those provisions, as did the CEC.
5 Because nobody's ever disclosed where this project
6 will be. Identifying the meets-and-bounds
7 location of the project, exclusive of the address,
8 exclusive of any maps, is not telling people where
9 the project will be.

10 While the Energy Commission seems to
11 have found its way around the new source review,
12 they haven't found a way around the federal --
13 permit, and that's where these projects are
14 getting jammed up.

15 I demonstrated that the Russell City
16 Energy Center was processed illegally, and that
17 permit has been remanded.

18 I demonstrated that the Gateway facility
19 was processed illegally, and that's now the
20 subject of a Department of Justice lawsuit against
21 PG&E, and back at the CEC for an amendment of
22 complaint.

23 I demonstrated that Humboldt was
24 processed illegally. That's now back at the CEC
25 for an amendment. I demonstrated that Colusa was

1 processed illegally. That's now back at the CEC
2 for amendment.

3 As long as the CEC keeps bypassing the
4 new source review or the Clean Air Act provisions,
5 it's not licensing facilities that can easily be
6 built.

7 The project identified itself as -- the
8 first project objective is build a natural gas
9 fired facility. When that's the objective
10 alternatives must -- a clean opportunity can't
11 compete. And that's what your record indicates,
12 that, well, that a solar opportunity or
13 alternative generation sources won't be the plan
14 here.

15 But if it's -- the intention seems to be
16 that the more of these gas facilities that you
17 build, the more greenhouse gases you'll eliminate
18 by building a facility with this 50 percent
19 efficiency, when modern facilities are more like
20 60 percent efficiency. It's not consistent,
21 again, with the Clean Air Act.

22 And if the Commission's contention is
23 that building more natural gas facilities is going
24 to somehow alleviate global warming, then they
25 should probably take that contention back to the

1 legislature and inform them that they've found a
2 cure for AB-32, that solar's not a viable
3 alternative for California.

4 That's what this decision is saying, is
5 that, well, these projects that are planned,
6 they're not viable alternatives.

7 The Commission, in its decision, they've
8 ignored the, I guess sister agencies you'd call
9 them, that have participated. The Cal-ISO, the
10 PUC, the State Water Board, who should all have a
11 say in this siting.

12 It's -- the facility will operate
13 continuously. So there's no consideration of
14 startup and shutdown. But that's not how we see
15 facilities operate. We don't see them run
16 continuously. We see them start and stop. Even
17 in their licenses the CEC, to run continuously
18 they come back to the air district, like Metcalf
19 and a couple other have, to change their operating
20 profile to start and stop on a daily basis.

21 But without looking at how the facility
22 is planned to be operated, there's no knowing what
23 these emissions will be if this thing starts and
24 stops on a daily basis, or when it's needed, like
25 it likely will. That's not what you licensed.

1 And I don't see a provision that's going to
2 restrict this facility to operating all the time.

3 So the emissions are going to be
4 significantly different than the proposal. And
5 what happens when they come back and they say,
6 okay, we have a power purchase agreement now, but
7 we don't run all the time. Then if the facility
8 is built, it'll operate and it'll pollute more.

9 You know, the notices kind of told
10 people what's going on. They haven't told the
11 people where it's at. They haven't told the
12 people that this facility will represent 708
13 percent of the maximum standard for particulate
14 matter in the community.

15 The staff seems to argue that my
16 contention that you follow the state law and
17 consider solar above the aqueduct. And the
18 contention is that I haven't proved that that's a
19 viable state law.

20 Well, if it's not a viable state law,
21 that's not an argument between the CEC Staff and
22 myself. That should be between the CEC Staff and
23 the legislature who wrote the law. I shouldn't be
24 in a position that I need to -- every law that's
25 contrary to design this facility.

1 So as long as there's questions on the
2 startup and shutdown, or a definition of what the
3 operating profile will be, including the water
4 usage, the decision says, well, it's going to be
5 less than the amount of 500 homes. And that's the
6 relationship between 500 homes and a power plant,
7 it is not necessarily a fair comparison.

8 The state's use of water is probably
9 predominately for homes and agriculture. So that
10 being the intended use, even if it uses less than
11 that for a power plant, that doesn't mean that the
12 use is not significant. But the rest of the
13 facility's use will be less than 500 homes. The
14 record shows that the facility is licensed or
15 permitted from the city to use 200 acrefeet of
16 water per year. It's above that significant
17 level.

18 But the record doesn't indicate that
19 when and if they use their permitted allocation of
20 water, that you go back to the Water Board.
21 There's no provision. There's no consideration
22 for the Water Board, who should be making this
23 decision, whether this facility is the best use of
24 the state's water in these drought times.

25 That's what I got to say. Thank you.

1 HEARING OFFICER FAY: Okay. Thank you,
2 Mr. Simpson. And I must admonish you again that
3 as a party in the case, you were subject to the
4 Committee's order and other directives to the
5 parties in the case to file their comments on the
6 PMPD no later than 3:00 p.m. on Monday, November
7 30th. And we did not receive any comments from
8 you.

9 MR. SIMPSON: And so that consideration
10 of timeliness, does that -- is that different than
11 if my statement was public comment? What's the
12 ramifications of your timeliness concern?

13 HEARING OFFICER FAY: Well, we are going
14 to be taking comments from members of the public.
15 But you are a party in this case, and you had
16 specific rights and obligations, as a party. And
17 the Committee directed what those had to be.

18 So now I'd like to ask if there are --
19 we've had a few people come in. Is there any
20 representative of CURE here? Anybody from CRPE,
21 the Center on Race, Poverty and the Environment?
22 Or the Sierra Club?

23 Okay, then I'll ask the parties if they
24 have anything further before I take comments from
25 members of the public. Anything?

1 MS. LUCKHARDT: I guess at this point in
2 time I have a question as to whether the Committee
3 would like us to attempt to reply on the fly to
4 Mr. Simpson. Or, you know, what's the Committee's
5 pleasure on that?

6 And that's what I'm trying to understand
7 here, because I've got a few notes on the comments
8 that Mr. Simpson made. And so I'm trying to
9 understand whether we should be trying to get our
10 air quality expert to speak to some of these
11 issues, or, you know, what's the Committee's
12 desire here?

13 HEARING OFFICER FAY: Let's go off the
14 record a moment.

15 (Off the record.)

16 HEARING OFFICER FAY: Back on the
17 record. I can understand your interest in wanting
18 to respond to Mr. Simpson' comments. And the
19 whole problem with him failing to file written
20 comments is it gives you no notice.

21 So, if you'd like to file a written
22 response later, we could give you some time to do
23 that. The close of the comment period is December
24 10th, and you're welcome to respond by then if
25 you'd like. And I'll leave that to your option

1 because you've been put at a disadvantage.

2 MS. LUCKHARDT: Okay, I believe that's
3 fair. And, you know, we can take a look at these.
4 I believe that a lot of these have already been
5 raised. But I would like to be able to double-
6 check the information that's there and make sure
7 that they're things that have already been
8 answered.

9 HEARING OFFICER FAY: All right, so as
10 we'll leave it, then, at the applicant's option
11 they may file a written response to Mr. Simpson's
12 comments made today. And it be limited to that.

13 I also see that we've got some people on
14 the line. And I'd like to ask if they have any
15 comments to make. Does the city wish to say
16 anything? Mayor Casida or Ms. Whitten.

17 MS. WHITTEN: The Mayor is indicating to
18 me that no, he has no comments. This is Melissa
19 Whitten, the City of Avenal. As you know, we've
20 been involved in the project since 2001, and on
21 behalf of the city we are supportive, and have
22 been from the beginning.

23 HEARING OFFICER FAY: Thank you. And
24 we'll ask the Air District, do they wish to make
25 any comments at this time?

1 MR. SWANEY: Yeah, good afternoon. This
2 is Jim Swaney, and we have no comments at this
3 time.

4 HEARING OFFICER FAY: Okay. Thank you
5 for being with us and monitoring.

6 Then I'll ask the parties if they have
7 any -- are there any members of the public here
8 that would like to make a comment in person? Yes,
9 sir, could you come up. Make sure the microphone
10 is on. Just push that green button --

11 MR. LEON: This green --

12 HEARING OFFICER FAY: Yes. Push the
13 green button until the mic comes on. Please give
14 your name and spell it.

15 MR. LEON: My name is Rey Leon, R-e-y,
16 last name Leon, L-e-o-n, Executive Director of
17 Valley LEAP Project. We've been working for the
18 past couple of years on clean energy for healthy
19 communities, education and development of green
20 jobs.

21 And we actually have an event next week
22 on the 10th of December on green jobs summit. And
23 it's part of the efforts that we move forward. We
24 are a part of the San Joaquin Valley Green Jobs
25 Coalition. And this coalition is all about clean

1 energy, renewable energy, economic development,
2 economic justice, environmental justice.

3 And it is for that reason that I am
4 here. The fact that many of our -- well, not
5 many, but apparently the City of Avenal has really
6 been working on this project since 2001, without
7 really engaging the community effectively.

8 I have family that lives in the City of
9 Avenal and I've been engaged in the community for
10 quite awhile now. And the city council concerns
11 and voice really doesn't incorporate the concerns
12 and voice of the populace of that city, as it
13 should.

14 This community of Avenal is about 80
15 percent Latino, but, you know, a few -- well, I
16 also grew up there. I went to Avenal High School
17 for a couple years, and grammar school.

18 But my whole experience, and to this
19 date, the historical experience has been about
20 inequity and really undermining the voice of the
21 people.

22 And there have been various incidents
23 that have only supported that argument, that
24 point. And this is just one more incident where
25 the community was never truly engaged in the

1 process to share whether it was a favorable
2 project or not.

3 But the individuals that we've talked to
4 and that have attended your hearings at the CEC
5 has had in the community of Avenal -- many of you
6 know because you were there -- there has been
7 strong opposition from the community.

8 While four out of the five city council
9 members have supported it, at least one city
10 councilmember has opposed this project, for the
11 fact that it will be contaminating a great deal on
12 the west side of the San Joaquin Valley. And this
13 is the side of the region that is very much rural,
14 but also farmworker, very poor. Actually there's
15 reports that talk about it as the Appalachias of
16 the West.

17 And so there's huge problems with having
18 this project be set up in this area, and in the
19 valley, in general. The San Joaquin Valley can
20 speak to you on the region still being one of the
21 most contaminated air basins in the nation.

22 And as well as the poorest. And what
23 that means when you're a poor community you don't
24 have health insurance. And I repeated this
25 before, but the point is that people understand

1 it. Not just hear it, but understand it.

2 If there is going to be a new emissions,
3 I guess about 500 tons per year, that's going to
4 be huge on the impact of public health in this
5 area. Especially with families that don't have
6 health insurance.

7 And I know the company's not going to
8 work to afford them that ability. And, of course,
9 this will not create jobs. We know that really if
10 you want to create jobs and a tax base and
11 maintain a good public health, renewable energy is
12 the way to go.

13 And so I would strongly recommend that
14 the city again take a look at that. And I know
15 that they are starting to examine it, but in the
16 setting up of 500 emissions, additional emissions,
17 tons, 500 tons of emissions in this part of the
18 valley will be drastic to the public health of the
19 people.

20 And they should listen to the residents.
21 They shouldn't support this project. And I
22 recommend that the California Energy Commission,
23 you know, share the will of the people from this
24 community of Avenal that are strongly opposed to
25 it.

1 HEARING OFFICER FAY: Thank you, Mr.
2 Leon. Would anybody else present like to make a
3 public comment?

4 MR. SIMPSON: This is Rob Simpson. I
5 would.

6 HEARING OFFICER FAY: Mr. Simpson,
7 you're a party in the case. And we've heard from
8 you.

9 Is there anybody else here at the
10 hearing that would like to make a public comment?
11 And, again, want to remind people that we have a
12 Spanish translator.

13 Gabriela, could you come forward and
14 just make a brief announcement in Spanish as to
15 the services that you're offering today? Be sure
16 that the light is on. Push the green button.
17 Thank you.

18 THE INTERPRETER: (Announcement in the
19 Spanish language.)

20 HEARING OFFICER FAY: Thank you very
21 much.

22 MR. SIMPSON: Am I precluded from
23 commenting?

24 HEARING OFFICER FAY: No, you're not.
25 You have -- we accepted your comments even though

1 you did not file timely, as required of the
2 parties in the case.

3 Is there --

4 MR. SIMPSON: -- subject to public
5 comments then?

6 HEARING OFFICER FAY: Well, the
7 Committee will take them under advisement. That's
8 all I can say at this time. And --

9 MR. SIMPSON: -- public comment.

10 HEARING OFFICER FAY: -- is there any
11 other person on the line that would like to make a
12 comment?

13 Okay, I hear no indication. And I think
14 we've called on everybody that has been available.

15 Any closing remarks from the parties?

16 From the applicant?

17 MS. LUCKHARDT: No, we have nothing
18 further.

19 HEARING OFFICER FAY: Okay. From the
20 staff?

21 MS. DeCARLO: Nothing from the staff.

22 PRESIDING MEMBER BYRON: I'll be very
23 brief. I'd like to thank everyone for their
24 diligence in the conducting of this proceeding.
25 It's taken a long time for us to get to this

1 point.

2 I apologize to the applicant. This
3 Commission endeavors to get to decisions much more
4 quickly than this. And as you know, we've been
5 extremely busy of late.

6 But members of the public and the
7 intervenors who happen to not be present today,
8 except in the way of Mr. Simpson, I'd like to
9 thank you for the way you all conducted yourself
10 in this matter.

11 We will likely be presenting this, our
12 plan is to present this to the full Commission for
13 consideration on December 16th.

14 Mr. Fay, I thank you very much because I
15 think you really had to press in order to get this
16 done in the time and schedule that we have.

17 I'll turn to my Associate Member, in the
18 event she'd like to say anything. Madam Chairman.

19 ASSOCIATE MEMBER DOUGLAS: No, I think
20 you summed it up very well.

21 PRESIDING MEMBER BYRON: All right,
22 thank you. Mr. Fay, go --

23 MR. SIMPSON: I'd like to make my public
24 comments.

25 HEARING OFFICER FAY: Yeah, Mr. Simpson,

1 the rules of the game, a party cannot, you know,
2 make their comments and then come back and say now
3 I'm a member of the public and I'm making
4 comments, and get two bites of the apple.

5 However, the Chair reminded me that you
6 are a party in the case, and I had asked if there
7 were any closing comments from the parties. So
8 I'm going to give you an opportunity to make a
9 comment.

10 MR. SIMPSON: Well, what I'd like to
11 clarify is that the comments that I've made are
12 considered public comments, as well. Or I can
13 restate them in public comment.

14 HEARING OFFICER FAY: Well, they're
15 certainly on the record. This is a transcribed
16 hearing. And they're there for the Committee to
17 consider.

18 So, if you have nothing further, then
19 we'll close things up.

20 All right, I want to thank all the
21 parties for coming together today, by various
22 means, and advising the Committee.

23 And now we are adjourned.

24 (Whereupon, at 2:13 p.m., the PMPD
25 Conference was adjourned.)

CERTIFICATE OF REPORTER

I, DEBORAH BAKER, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of December, 2009.

DEBORAH BAKER

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

December 9, 2009

Margo D. Hewitt,

AAERT CET**00480