

April Rose Sommer
Attorney for Rob Simpson
P.O. Box 6937
Moraga, CA 94570
AprilSommerLaw@yahoo.com
(925) 962-9755

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:) Docket No. 07-AFC-6
)
) MOTION FOR RESCISSION OF
) THE MAY 9th, 2011 PRESIDING
) MEMBER'S PROPOSED DECISION
)
Carlsbad Energy Center Project)

Intervenor Rob Simpson brings this Motion for Rescission of the May 9th, 2011 Presiding Member's Proposed Decision ("PMPD") pursuant to 20 CCR § 1716.5. The California Energy Commission has failed to comply with the procedural and substantive requirements of the Public Resources Code and Energy Resources Conservation and Development Commission regulations for applications for certification in drafting a non-complaint PMPD. The commission cannot enter a legal written order based on the current PMPD. The PMPD needs to be rescinded, and redrafted in compliance with the procedural and substantive requirements for written orders on applications for certification, with rescheduled and properly noticed hearings.

I. THE COMMISSION HAS NOT COMPLIED WITH PROCEDURAL REQUIREMENTS FOR THE ISSUANCE OF A WRITTEN ORDER ON AN APPLICATION FOR CERTIFICATION

The Code and commission regulations are very clear in detailing the required procedures for issuing decisions on applications for certification. First, evidentiary hearings are held. “The commission hearings shall provide a reasonable opportunity for the public and all parties to the proceeding to comment upon the application and the commission staff assessment.” (Cal. Pub. Res. Code § 25521.)

A written decision is prepared only upon the conclusion of the evidentiary hearings: “the commission shall prepare a written decision after the public hearing on an application.” (Cal. Pub. Res. Code § 25523; See 20 C.C.R. § 1749.) This written decision is drafted as the presiding member’s proposed decision: “At the conclusion of the hearings, the presiding member, in consultation with the other committee members shall prepare a proposed decision on the application based upon evidence presented in the hearings on the application.” (20 C.C.R. § 1749.)

The PMPD is prepared “based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application” and “shall contain reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision.” 20 C.C.R. § 1751. The PMPD is then published, distributed, and the public is given an opportunity to comment:

The proposed decision shall be published and within 15 days distributed to interested agencies, parties, and to any person who requests a copy. The presiding member shall publish notice of the availability of the proposed decision in a newspaper of general circulation in the county where the site is located. Any person may file written comments on the presiding member's proposed decision. The presiding member shall set a comment period of at least 30 days from the date of distribution. (20 C.C.R. § 1749.)

A hearing is then held before the full commission “after the comment period on the presiding member's proposed decision.” 20 CCR 1754. The commission may only consider the evidence in the hearing record:

The commission shall not consider new or additional evidence at the hearings under this section unless due process requires or unless the commission adopts a motion to reopen the evidentiary record. In such case, the commission shall afford such notice to the parties as is fair and reasonable under the circumstances.
(20 CCR § 1754.)

The public must be provided adequate notice for all actions taken on an application for certification. “The adviser shall require that adequate notice is given to the public and that the procedures specified by this division are complied with.” Cal. Pub. Res. Code § 25519

In this case, the PMPD was drafted, in violation of Cal. Pub. Res. Code §§ 25521, 25519 and 20 C.C.R. §§ 1749, § 1751, § 1754, *before* evidentiary hearings were concluded; the PMPD, May 19th, 2011 evidentiary hearings, and committee and commission hearings were actually all noticed in the same document “Notice Of Availability Of The Presiding Member’s Proposed Decision And Notice Of Committee Conference And Evidentiary Hearing And Notice Of Full Commission Hearing.” The PMPD is therefore invalid as it was not prepared “after the public hearing on an application” (Cal Pub Resources Code § 25523) and cannot possibly be “based upon evidence presented in the hearings on the application” (20 C.C.R. 1749) as the PMPD was published ten days prior to a scheduled evidentiary hearing. It is shocking that the commission has such a lack of respect for its own process and taxpayer resources that it would hold a hearings to solicit evidence with the intention of entirely disregarding the evidence.

II. THE PMPD DOES NOT INCLUDE LEGALLY MANDATED CONTENT

The PMPD is also in violation of the law as it cannot “contain reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision.” (20 C.C.R. § 1751.) Pursuant to Public Resources Code § 25523 and 20 C.C.R § 1752, the written decision must include:

- “Specific provisions relating to the manner in which the proposed facility is to be designed, sited, and operated in order to protect environmental quality and assure public health and safety.” (Pub. Res. Code § 25523(a).)
- “Findings regarding the conformity of the proposed site and related facilities with . . . public safety standards and the applicable air and water quality standards, and with other applicable local, regional, state, and federal standards, ordinances, or laws.” (Pub. Res. Code § 25523 (d) (1).)
- “[S]pecific conditions requiring the facility to be monitored to ensure compliance with toxic air contaminant control measures adopted by an air pollution control district or air quality management . . .” (Pub. Res. Code § 25523(g).)
- “A discussion of any public benefits from the project including, but not limited to, economic benefits, environmental benefits, and electricity reliability benefits.” (Pub. Res. Code § 25523(h).)

The committee claimed that, “in part on its own motion and in part in response to the various motions of the parties requesting that the evidentiary record be reopened, [the committee] has decided to reopen the record and conduct additional hearings on the following topics.” (Notice Of Availability Of The Presiding Member’s Proposed Decision And Notice Of Committee Conference And Evidentiary Hearing And Notice Of Full Commission Hearing.) The committee deigned to take evidence at the May 19th, 2011 hearing on power plant fires, the available fire suppression water system, seismic safety, compliance with the Clean Air Act, compliance with local ordinance, and showing of an extraordinary public purpose.

These topics all clearly fall within the Public Resources Code § 25523 and 20 C.C.R § 1752 requirements and must, therefore, be included in the PMPD. The commission has made a

mockery of the hearing process by pretending to solicit evidence on critical, legally mandated issues while simultaneously announcing to the world that all such evidence will be entirely ignored, as the PMPD had already been drafted. The PMPD, as currently drafted, is not in compliance with the law and must be redrafted to include the May 19th, 2011 hearing. The commission can in no way argue that the PMPD “contain[s] reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision” (20 C.C.R. § 1751), when it has excluded evidence based, not on any analysis of its content, but solely upon the date the evidence was entered into the record.

DATED: June 14, 2011.

Respectfully,

By: 
April Rose Sommer

Attorney for Rob Simpson

