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In Pro per

**STATE OF CALIFORNIA**

Energy Resources Conservation  
And Development Commission

In the Matter of: ) Docket No. 97-AFC-1  
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)  
The Application for Certification )  
For the High Desert Power Project [HDPP] )  
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**MOTION FOR STAY OF SITE  
CERTIFICATION PROCEEDINGS**

Respectfully submitted:  
May 1, 2000

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GARY A. LEDFORD  
PARTY IN INTERVENTION  
IN PRO PER

**MOTION FOR STAY OF THE  
PRESIDING MEMBER'S PROPOSED DECISION (RPMPD)**

Gary A. Ledford, an Intervenor in the High Desert Power Project (HDPP) proceedings, Hereby moves for a Stay in the Energy Commission's Site Certification of HDPP based on the Committee's Revised Presiding Member's Proposed Decision (RPMPD) of March 2000, docketed March 31, 2000, pending the outcome of two significant decisions:

First, the California Energy Commission should stay proceedings pending consideration of Intervenor's Motion to Reconsider the Revised Presiding Member's Proposed Decision (RPMPD) currently before the Committee assigned to the High Desert Power Project (HDPP); and

Second, it is necessary and prudent for the Energy Commission to stay this site certification proceeding pending the decision by the California Supreme Court in the pending case <sup>1</sup> which will decide the rights and responsibilities of water-users in the High Desert.

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<sup>1</sup> Pending Review In the California Supreme Court Docket No. S07172S CITY OF BARSTOW et al., Plaintiffs and Respondents, v. **MOJAVE WATER AGENCY** et al. Defendant, Cross-complainants and Respondents, JESS RANCH WATER COMPANY, Cross-defendant and Appellant. And MOJAVE WATER AGENCY et al., Cross-complainants and Respondents, v. MANUEL CARDOZO et al. Cross-defendant and Appellants. Court of Appeal Case Nos. 017881/ E018923/ E018023 and E018681 v. Superior Court No. 208568

## **I. THE MOTION**

This request is made on the grounds that there will be irreparable harm to the citizens in the High Desert if the Energy Commission goes forward with the certification process for the subject Application for Certification (AFC).

First, it is Intervenor's position that the Energy Commission will be making a decision on a record containing prejudicial procedural errors that must first be corrected. Intervenor's pending Motion to Reconsider the RPMPD seeks to correct previous procedural errors and provide a balanced evidentiary record for proper decision-making. The citizens of the High Desert area are relying on the Energy Commission to reach a CEQA-compliant decision that protects their rights as citizens, taxpayers, homeowners and water-users for today and for the life of the HDPP.

The second reason for the motion goes right to the heart of good-governance...Namely, Intervenor is requesting that the Energy Commission duplicate the action of its sister agency California Department of Water Resources and stay decision-making on the water issue pending the soon-expected answer from California's Supreme Court.

For these reasons, the public's right to participate in the RPMPD has been compromised, and the proceeding must be stayed to comply with CEQA, correct the record and revise the RPMPD.

Finally, Intervenor would add that, should the Energy Commission mandate the condition of dry cooling, the critical water issue raised by certifying HDPP disappears. In that event, Intervenor would withdraw this Motion for Stay.

## II. SUMMARY OF ARGUMENTS

In order for the Energy Commission to conduct a proper review and evaluation of the HDPP proposal, the Energy Commission must identify potential impacts and determine whether the project would conform and comply with applicable laws. As stated in Intervenor's Motion to Reconsider the RPMPD, the hearing record has material omissions; documents were placed into "administrative record" without proper observance of the procedural rules requiring service of all documents on all parties; and finally, information missing from the record now before you actually conflicts with one of the RPMPD findings.

Given the current uncertainties regarding the availability of water to be utilized to cool the plant; the non-existence of a "will serve letter", the critical litigation to determine water rights currently before the California Supreme Court, the HDPP evaluation cannot be properly conducted as required by the Warren-Alquist State Energy Resources and Conservation and Development Act ("Warren-Alquist Act")<sup>2</sup> and the California Environmental Quality Act of 1970 ("CEQA").<sup>3</sup>

Continuing this site certification proceeding would be prejudicial to and may result in unnecessary burdens on the residents of the High Desert communities and Intervenor. As a citizen and taxpayer, Intervenor believes that the Energy Commission should enforce a standard that promotes efficiency and fairness in its review process. The Energy Commission should require the Applicant to prove, before certification, a CEQA compliant contractual supply of water so that the facility's production of

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<sup>2</sup> Cal. Public Resources Code Section 25000 et seq. And the state implementing regulations set forth at 20 California Code of Regulations Section 1001 et seq.

<sup>3</sup> Cal. Public Resources Code Section 21000 et seq. And the state implementing regulations known as the "CEQA Guidelines," set forth at 14 California Code of Regulations Section 15000 et seq.

electricity can be deemed “reliable.” In the absence of water-certainty, the Energy Commission should either not certify the project or allow certification conditioned on the use of dry cooling technology.

Intervenor requests that the stay be imposed. Intervenor believes the pending outcomes of the Motion to Reconsider the RPMPD and the California Supreme Court case must be resolved to provide the decision-makers a clearer record upon which to base the certification decision.

### **III. BASIS FOR STAY**

#### **BACKGROUND**

The background to Intervenor’s request for a stay pending the outcome of Intervenor’s Motion to Reconsider the RPMPD is fully set out in the Motion. Intervenor’s position is that due to prejudicial procedural errors, the record before the Energy Commission is incomplete, unclear and proposes a finding in opposition to the evidence.

The background to Intervenor’s request for a stay pending the decision of the California Supreme Court is made to allow the Supreme Court to rule and clarify certain fundamental legal and technical issues related to the water controversy in the HDPP case. Pending court resolution, the Energy Commission should immediately suspend site certification proceedings for the HDPP. To do otherwise would (1) result in an improper environmental review and evaluation of HDPP’s proposed project, and be inconsistent

with the mandates and policies of the Warren-Alquist Act<sup>4</sup> and CEQA,<sup>5</sup> and (2) be prejudicial to and may cause unnecessary burdens on intervenor and other residents of the High Desert community.

**A. Project Review Under the Warren-Alquist Act**

The Warren-Alquist Act and its implementing regulations require the Energy Commission to determine whether the HDPP, as proposed, would conform and comply with applicable federal, state, regional and local laws.<sup>6</sup>

The RPMPD allowing certification of HDPP does not comply with Article X Section 2 of the California Constitution which prohibits the unreasonable use or waste of water.<sup>7</sup>

The RPMPD, by recommending certification of HDPP, does not comply with the Energy Commission's mandate to prevent "delays and interruptions in the orderly provision of electrical energy, protection of environmental values, and conservation of energy resources<sup>8</sup> ...to promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources...criteria used in analysis of proposed actions shall include lifecycle cost evaluation, benefit to taxpayers, reduced fossil fuel or REDUCED WATER CONSUMPTION DEPENDING ON THE APPLICATION,<sup>9</sup>..."

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<sup>4</sup> California Public Resources Code Section 25000 et seq. And the state implementing regulations set forth at 20 California Code of Regulations Section 1001 et seq.

<sup>5</sup> California Public Resources Code Section 21000 et seq. And the state implementing regulations set forth at 14 California Code of Regulations Section 15000 et seq.

<sup>6</sup> Public Resource Code Section 25523(d) and Title 20 of the California Code of Regulations Section 1744

<sup>7</sup> Argument of the Mojave Water Agency in it's brief on file with the California Supreme Court Footnote No. 1

<sup>8</sup> California Public Resources Code Section 25005

<sup>9</sup> California Public Resources Code Section 25008

No one disputes that the Energy Commission was created to assure citizens a reliable supply of electricity. With the newly deregulated market however, some assert that the Energy Commission is now to allow the marketplace to determine reliability. Intervenor asserts this contention is erroneous. The unregulated market is sure to determine a project's financial viability. Viability will be the outcome of applicant choices and marketplace responses to those choices. "Reliability" is quite different. If the Energy Commission allows the marketplace to determine reliability, there is no longer a need for the Energy Commission.

Since the project's water supply relies on several documents that are not in existence (there is neither a "will-serve-letter," nor any of the other supporting contracts) it would be difficult, if fact impossible, for the Energy Commission to perform this assessment of compliance and unlawful to rely on these "proposed agreements" which in and of themselves require CEQA compliance.

#### **B. Project Review Under CEQA**

If the Energy Commission continues its review of HDPP's proposal with the pending Supreme Court decision, and the existing contract uncertainties (no will-serve-letter, no supporting contracts) this precludes a proper review of the existing environment under CEQA. The Energy Commission siting process would not adequately alert the public and responsible agencies to the consequences of the HDPP's proposed facility.

The Court of Appeals of the First Appellate District asserted this principle in San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus ("Raptor").<sup>10</sup> In Raptor, the Court found that an incomplete description of the environmental setting is not only inadequate as a matter of law, but also renders the identification of environmental

impacts inadequate and precludes a determination that substantial evidence supports the (County's) finding that the environmental impacts on wildlife and vegetation had been mitigated to insignificance.<sup>11</sup>

The Court found that an EIR needs to serve as an “alarm bell” with the purpose of alerting the public and its responsible officials to environmental changes before they have reached the point of no return.<sup>12</sup> In this case as in Raptor, the misleading nature of the discussion of the environmental setting which fails to mention HDPP's unavoided impacts on water recharge renders the RPMPD inadequate as an informational document.<sup>13</sup>

As in Raptor, the RPMPD is a document, which by negligence or intention failed to accurately describe the existing environment.

If the Energy Commission proceeds with the HDPP site certification, it will, by the very nature of the water contract uncertainties, certify a document that cannot accurately assess the present environmental setting. As long as the water supply issue is uncertain and the non-existence of a water contract (will-serve-letter) is the status, any discussion of the environmental impacts of the plant will be speculation at best. For the Energy Commission to base its discussion of the existing environment on speculation would be misleading and an abuse of discretion as defined in Raptor.

Moreover, the Energy Commission cannot cure this deficiency by relying on clarifications to its environmental review document, which take place subsequent to

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<sup>10</sup> 27 Cal. App. 4<sup>th</sup> 713 (1994).

<sup>11</sup> Id. at 729.

<sup>12</sup> Id. at 721 (citing Laurel Heights Improvement Assn. V. Regents of University of California, 47 Cal. 3d 376, 391 fn. 2 (1988)).

<sup>13</sup> Id.

issuance of the RPMPD. This principle is set forth in City of Santee v. County of San Diego.<sup>14</sup> In Santee, the Court of Appeals held that changes the County of San Diego made to the EIR immediately prior to its certification violated CEQA. San Diego had proposed an expansion to its existing prison for a period of three years, but the expansion was extended to seven years by the county's planning and environmental review board. The Court stated, “(t)he belated time frame of the (change) was too little too late to adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project.”<sup>15</sup> This principle is further delineated in the context of the National Environmental Protection Act.<sup>16</sup>

It is therefore sensible for the Energy Commission to stay this proceeding until the rest of the legal landscape becomes clearer and more stable. Moreover, the site certification proceedings in light of the significant uncertainties set out above would not only be inefficient, but actually prejudicial to the interests of the Intervenors and other members of the public of High Desert.

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<sup>14</sup> 214 Cal. App. 3d 1438 (1989)

<sup>15</sup> Id.

<sup>16</sup> See, e.g., California v. Block, 690 F. 2d 753, 770.

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Energy Resources Conservation  
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In the Matter of: ) Docket No. 97-AFC-1  
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The Application for Certification ) PROOF OF SERVICE  
For the High Desert Power Project [HDPP] )  
\_\_\_\_\_ )

I Kathie Mergal declare that on \_\_\_\_\_, I deposited copies of the attached **Motion for Stay of Site Certification Proceedings**, in the United States mail in Apple Valley California with first class postage thereon fully prepaid and addressed to the following:

Signed original document plus 11 copies to the following address:

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In addition to the documents sent to the Commission Docket Unit, individual copies of all documents were sent to:

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

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Kathie Mergal