

STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 00-AFC-13
	)	
Application For Certification of the	)	ENERGY COMMISSION
AES HUNTINGTON BEACH GENERATING	)	STAFF'S RESPONSE TO
STATION RETOOL PROJECT.	)	APPLICANT'S PETITION
	)	FOR RECONSIDERATION
_____	)	

The Energy Commission staff submits the following response to the Petition for Reconsideration ("Petition") filed by the project applicant AES Huntington Beach, LLC ("AES").

I. Background

AES's Application for Certification was filed December 1, 2000, and determined to be data adequate on February 7, 2001. An expedited hearing schedule was adopted pursuant to Governor's Executive Order D-22-01. On March 16, 2001, the siting committee for this project held a public hearing in Huntington Beach. A Presiding Member's Proposed Decision was released on March 29, 2001. An amended Presiding Member's Proposed Decision was released on April 13, 2001 after the receipt of party and public comments. This matter was originally noticed for hearing before the full Energy Commission on April 18, 2001. That hearing was continued to April 25, then to May 2 and then to May 10, 2001 at the request of AES. On May 10, the Energy Commission heard comment and argument from the parties and the public and adopted its decision, docketed on May 11, 2001. On June 11, 2001, AES filed the Petition for Reconsideration.

## II. Removal of Condition Emergency-1

Condition Emergency-1 of the Certification approved on May 10 required AES to “enter into an electricity sales contract with DWR to sell the generation from Huntington Beach Units 3 and 4 to address the electricity supply emergency.” Negotiations between AES and the California Department of Water Resources (DWR) have terminated without the execution of such an agreement.<sup>1</sup> Without dwelling on the reasons for the failure of negotiations,<sup>2</sup> staff accepts the present reality that no such contract can be expected and, if the project is to go forward, it is necessary to modify or remove condition Emergency-1.<sup>3</sup>

Staff believes that the 450 MW of generating capacity that this project offers is valuable to the residents of California for the near term and especially for the remainder of this summer peak season. We therefore recommend that the project be allowed to go forward and that the requirement in condition Emergency-1 for a power sales contract be removed provided that the duration of the permit is reduced to five years as described in Section III, below.<sup>4</sup>

Without the DWR contract, however, the concerns expressed by many of the parties and public commentators about allowing AES to sell power into a volatile energy market in which power generators and resellers, AES among them, are

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<sup>1</sup> A June 18, 2001, letter from Department of Water Resources Deputy Director Raymond D. Hart to Mark Woodruff of AES indicates that “DWR has concluded that these negotiations cannot be successfully concluded and accordingly DWR has determined to terminate these negotiations as of Friday, June 15, 2001.” A copy of this letter is attached hereto as Attachment A.

<sup>2</sup> Staff does, however, reserve the right to present evidence regarding the negotiations should the good faith of the parties in those negotiations be put in issue in this proceeding.

<sup>3</sup> AES’s arguments are off the point. It reargues the Commerce Clause issues that were fully briefed prior to the May 10 hearing. In agreeing to the condition at the hearing (a decision that is conveniently ignored in its argument) and beginning to construct under the Certification, it has waived the ability to challenge it on those grounds. See, County of Imperial v. McDougal, 19 Cal.3d 505 (1977), 138 Cal.Rptr 472. AES also asserts that the condition hinders its ability to negotiate a contract with DWR without any factual support or explanation. The only issue here is whether the condition makes sense in light of the inability of the parties to negotiate a contract.

<sup>4</sup> The South Coast Air Quality Management District, in its Rule allowing power plants to access its Priority Reserve PM<sub>10</sub> emission credit bank, requires that 50% of the power generated be committed to California in

alleged to have manipulated the wholesale price of electricity, are not satisfactorily addressed. We recommend that the condition be amended to clearly provide that AES must comply with all market regulating laws and that AES's violation of those laws could result in the revocation of its license:

EMERGENCY-1: The project owner and any entity through which it may sell or otherwise broker the electricity generated by Units 3 and 4 shall comply with all laws, rules, regulations, executive, administrative or judicial orders or other lawful restrictions upon the sale of that electricity. A failure to comply may be sanctioned by the Commission as a failure to comply with a condition of approval with an appropriate penalty, including revocation of this certification.

### III. Modification of Condition Emergency-2 (Duration)

This project would provide a benefit to California—450 MW of additional generating capacity that would help meet the State's demand during the current energy crisis. That benefit comes with countervailing costs, however. We do not know the extent of the plant's contribution to the transport of bacteria to the beach, which can result in beach closures and the loss of recreational opportunities to beach visitors and commercial opportunities to local merchants. Nor do we know if that contribution can be successfully mitigated. In addition, although offset on a regional basis, local air pollutant concentrations will increase when the retooled generators are brought on line. And the time at which the residents of the area can enjoy the reduced visual profile of a modern combined cycle plant which combusts our finite fuel resources more efficiently<sup>5</sup>, is delayed.

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the form of a DWR contract. Any modifications to that Rule must be made by the Air District. We understand that AES is discussing modifications with the Air District.

<sup>5</sup> The Legislature has expressed a preference for combined cycle power plants over less efficient simple cycle power plants. See Public Resources Code Section 25552(e)(5) which requires, in order to take advantage of an expedited four-month review process:

(5) A binding and enforceable agreement with the commission, that demonstrates either of the following:

(A) That the thermal powerplant will cease to operate and the permit will terminate within three years.

(B) That the thermal powerplant will be modified, replaced, or removed within a period of three years with a combined-cycle thermal powerplant that uses best available control technology and obtains

In five years' time, if not sooner, the generating capacity from these less efficient generating units may no longer be necessary. Newer, cleaner, more efficient plants are expected to be constructed and operating to increase the State's reserve margin. Conservation measures are also expected to reduce demand. At that point, Units 3 and 4 become costs without benefit to California unless they are replaced with modern, more efficient, power plants.

Throughout the review of this project, staff drew the balance between the benefits and costs of this project at a five-year operational life for Units 3 and 4. Five years provided power during the time of energy emergency, allowed AES sufficient time to recover its investment and minimized the duration of the impacts upon Huntington Beach and its visitors. At the May 10 hearing, AES offered a project in which the output of the plant would be contractually committed to California in exchange for a ten-year certification.<sup>6</sup> The DWR contract was an additional benefit which Staff accepted as a reasonable tradeoff against a longer certification duration. That additional benefit is now off the table, though, and in Staff's view, its removal rebalances the equation in favor of a five-year duration.<sup>7</sup>

The evidence before the Commission, provided by the testimony of Donald Lincoln during the Committee's March 16 hearing in Huntington Beach<sup>8</sup>, shows that AES can recover its investment and make a reasonable profit by operating the plant for five years.

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necessary offsets, as determined at the time the combined-cycle thermal powerplant is constructed, and that complies with all other applicable laws, ordinances, and standards.

<sup>6</sup> MR. ROTHMAN [AES's counsel]: Well, if it would help, I think that they are inextricably intertwined. What you didn't hear Mr. Blackford say was that we have been consistent in our position with respect to emergency condition number 1, but that we didn't raise that as an issue today, and we are not objecting to that as a condition of certification, on the condition that the term, the duration of the certification is the ten-year time period. (May 10, 2001 Hearing Transcript, p. 9).

<sup>7</sup> If we have misread the future, AES can always petition to amend the decision to extend its certification. Presumably if it can make a compelling case for extension, it would be granted. Conversely, if the units are no longer economically competitive, as many believe they will be in five years, AES could apply for a certification to build a modern combined-cycle plant.

<sup>8</sup> March 16, 2001 hearing transcript, pages 43 – 53.

Should the Commission decide to delete condition Emergency-1, then, staff requests that the Commission further modify its Decision by amending condition Emergency-2 to provide for a five-year duration as follows:

EMERGENCY-2: Certification of the retooling project shall be effective to, and operation is authorized until, September 30, 2006. Upon the expiration of this certification, Units 3 and 4 shall not be operated.

Alternative should five-year duration be rejected. While Staff strongly believes that the duration of certification should be five rather than ten years, we offer the following comments for consideration in the event that the Commission does not adopt a five-year duration. By offering these comments, we do not mean to suggest that our position in favor of a five-year duration is less than resolute.

If the Commission sets a longer duration on the Certification, Staff requests that the review of AES's performance at the five-year point be described as proposed by Staff at the May 10 hearing and set forth here for convenience:

EMERGENCY-2: This certification is granted by the Energy Commission for a limited period subject to an extension review<sup>9</sup> by the Energy Commission as described below, conducted at the request of the project owner made no sooner than January 1, 2006 and no later than March 31, 2006. The project owner's request for extension review shall be accompanied by evidence relevant to the findings set forth below. The Energy Commission will approve the continuation of this certification if it finds that:

- the project owner has substantially complied with the conditions of certification;

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<sup>9</sup> The original proposed condition used the phrase "interim review" but, during the May 10 hearing, that phrase caused some confusion as to the condition's intent. Staff's intended then, and continues to intend now, that the certification be for five years subject to an extension for an additional five years if, after further review, affirmative findings regarding certain issues are made. We have substituted the phrase "extension review" to avoid confusion.

- the project owner has mitigated or is mitigating the project's contribution to environmental impacts that are the subject of the studies required by the conditions of certification; and
- all currently required permits (i.e., NPDES) are in force and the project owner is in substantial compliance with each permit.

If the Energy Commission approves the continuation, this certification will expire on September 30, 2011. If the Energy Commission does not approve the continuation or the project owner does not request the continuation before April 1, 2006, this certification will expire on September 30, 2006.

The above formulation primarily affects the “burden of proof”—which party must put on evidence to affirmatively prove its position and which would prevail if the party who bears the burden fails to prove its position. Under the above-proposed condition Emergency-2, AES would have the burden of proof and the five-year extension would not take effect unless the Commission makes the specified findings. Under the currently adopted condition Emergency-2, if the Commission cannot make the findings it must then begin a formal action of some sort—the condition is vague as to exactly what form that action must take—to terminate the certification. Until that action is taken, AES can continue to operate. Should the Commission take action to terminate the certification and AES challenges the termination action, it is likely that a Court would allow AES to continue to operate during the challenge. Therefore, even if AES has clearly failed to meet the expectations embodied in the findings, the adopted condition may allow it to operate for several years beyond a determination (made at the five-year review) that it is not entitled to do so.<sup>10</sup>

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<sup>10</sup> It is less likely that a Court would allow AES to continue to operate in the face of solid evidence against the required findings that are clearly designated as prerequisites for its continued operation (in Staff’s proposed version of Emergency-2).

IV. Conclusion

Staff recommends that the Commission grant the reconsideration request and modify its previous Decision in the following way:

- (a) Remove the DWR contract requirement from condition Emergency-1;
- (b) Substitute a requirement to comply with all electricity marketing laws and orders in condition Emergency-1; and
- (c) Modify condition Emergency-2 to provide a five-year license duration.

DATED: July 2, 2001

Respectfully submitted,

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PAUL A. KRAMER JR  
Staff Counsel

**DEPARTMENT OF WATER RESOURCES**

California Energy Resources Scheduling  
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June 18, 2001

Mark Woodruff  
AES Huntington Beach, L.L.C.  
690 N. Studebaker Road  
Long Beach, California 90803

Dear Mr. Woodruff:

The Department of Water Resources has been in negotiations with you as representative of AES Huntington Beach, L.L.C. for the purpose of entering into a power purchase agreement for the purchase of power from AES's Huntington Beach Units 3 and 4 which AES intends to repower for operation this summer.

DWR has been attempting to negotiate such an agreement with you in good faith on the basis of a letter of intent signed by you on March 2, 2001. Based on the negotiations to date, DWR has concluded that these negotiations cannot be successfully concluded and accordingly DWR has determined to terminate these negotiations as of Friday, June 15, 2001.

By a copy hereof DWR is hereby advising the California Energy Commission and the South Coast Air Quality Management District of the foregoing so that the Commission and the District may eliminate the conditions of the permit that limit sales to DWR.

If you have any questions on the forgoing, please do not hesitate to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Raymond D. Hart".

Raymond D. Hart  
Deputy Director

cc: (See attached list.)

Steve Larson  
CA Energy Commission  
1516 Ninth Street  
Sacramento, California 95814

Barry Wallerstein  
South Coast Air Quality Management District  
21865 East Copley Drive  
Diamond Bar, California 91765-4182