STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	**)**	**DOCKET NO. 98-SIT-1**
	)	
La Paloma Generating Company, LLC	**)**	**COMMISSION DECISION**
Petition for Jurisdictional Determination	**)**	**-with- DISSENTING OPINION**
_____)		

COMMISSION DECISION

AUGUST 1998

CALIFORNIA ENERGY COMMISSION

P800-98-003

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	**Docket No. 98-SIT-1**
	)	
La Paloma Generating Company, LLC	)	**COMMISSION ORDER ADOPTING**
Petition for Jurisdictional Determination	)	**COMMITTEE PROPOSED DECISION**
	)	

On August 12, 1998, the California Energy Commission held a public hearing, as part of its regularly scheduled business meeting, to consider the Proposed Decision issued by the Energy Facility Siting Committee in the above-captioned matter. The Committee recommended that, pursuant to Public Resources Code section 25540.6(a)(1), the Commission exempt the prospective La Paloma Generating Project from the Notice of Intention requirements of Public Resources Code section 25502.

After considering this recommendation and comments received at the August 12th hearing, the Commission hereby adopts the Committee's July 31, 1998 Proposed Decision, as modified at the hearing, as its Decision in this matter. Commissioner Sharpless dissented. Commissioner Moore filed a separate Dissenting Opinion which is attached to the Decision. (Publication No. P800-98-003).

Dated: August 12, 1998

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

WILLIAM J. KEESE
Chairman

DAVID A. ROHY, Ph.D.
Vice Chair

-DISSENTED-

JANANNE SHARPLESS
Commissioner

-DISSENTING OPINION FILED BY-

MICHAL C. MOORE
Commissioner

ROBERT A. LAURIE
Commissioner

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	**Docket No. 98-SIT-1**
	)	
La Paloma Generating Company, LLC	)	**COMMITTEE PROPOSED DECISION**
Petition for Jurisdictional Determination	)	
	)	
	)	

I. PROCEDURAL HISTORY

On June 11, 1998, La Paloma Generating Company (Petitioner) filed a "Petition for Jurisdictional Determination" under Public Resources Code (PRC) section 25540.6. Petitioner sought clarification of certain provisions contained in this statute, and requested that the Commission determine whether its La Paloma Generating Project[1] is exempt from the Notice of Intention (NOI) requirements of PRC, section 25502. Petitioner contended that the proposed project is the result of the creation of the California Power Exchange (PX) which solicits energy bids on an hourly basis. The project will be operated to sell all or some of its output to the PX.

The Energy Facility Siting Committee (Committee) scheduled a hearing on July 21, 1998, to consider the Petition. In accord with Commission regulations,[2] the Committee served the Petition upon individuals, organizations, and businesses identified as "interested parties" in the Petition, as well as upon other persons and entities appearing on appropriate separate mailing lists. The Notice recommended that all parties wishing to participate in the proceeding file written statements by July

[1] La Paloma Generating Company proposes to construct and operate a nominally rated 1,048 MW natural gas-fired facility, which will be located near abandoned oil wells in an oil production area of Kern County, two miles east of the town of McKittrick and approximately 35 miles west of Bakersfield. (7/21/98 Reporter's Transcript p. 13 [RT :__]).

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

15, 1998. The Committee also issued a Request for Clarification, dated June 29, 1998, that directed the parties to provide clarification and answers to several inquiries regarding the nature of "competitive solicitation or negotiation" relative to the proposed powerplant and the PX. Both Petitioner and Commission Staff filed position statements and responses to the Committee's inquiries.

At the July 21 hearing, Petitioner provided testimony supporting its contentions. No one present objected to the testimony or offered countervailing evidence. Staff provided testimony regarding the nature of the electricity market established by the PX.

Based on the written statements filed prior to the hearing and on the testimony at the hearing, the Committee issued this Proposed Decision on July 31, 1998. It was accompanied by a Notice that the full Commission would consider the Proposed Decision at its regularly scheduled Business Meeting on August 12, 1998.

II. APPLICABLE LAW

A. Statutory Requirements.

Public Resources Code section 25502 provides in pertinent part that:

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

The purpose of the Notice of Intention (NOI) requirements, which is explained in the Commission's regulations, is to provide an open planning process in which the applicant, interested agencies, and members of the public have the opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for the

[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).)

proposed project. (Cal. Code Regs., tit. 20, section 1721). The NOI process also addresses the issue of whether a proposed project is needed under the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, section 25502).

Successful completion of the NOI process, which would include approval of at least two specific site locations and a preliminary determination of need, is generally a prerequisite to the second stage of powerplant 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 powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... . (PRC, sections 25540.6(a)(1).)

Petitioner contends its proposed project fits within this provision.

B. Policy Guidance.

The Commission has authority to explain its interpretation of pertinent statutory or regulatory provisions. Typically, such elucidation occurs in the biennial Electricity Report **(ER)**, the most recently adopted of which is controlling for powerplant proposals filed during an **ER's** operative life. In the present instance, this guidance appears as part of the 1996 **ER** in which the Commission stated:

> For gas-fired powerplants which are the result of competitive solicitations or negotiations, we will continue our process for granting exemptions from NOI requirements to such projects. (**ER 96**, p. 75, Endnote 1).

The Commission policy expressed in **ER 96** is consistent with the views contained in **ER 94** and the Addendum to **ER 94** supporting the development of a competitive market in the production and sales

[4] In this instance, the Commission must issue a *final* licensing decision within 12 months (PRC, § 25540.6(a).)

of electricity. Moreover, there is no indication in **ER 96** that the Commission intends to evaluate NOI exemptions differently than they were evaluated under **ER 94.**

In the Addendum to **ER 94**,[5] the Commission clarified "...its policy regarding the eligibility of natural gas-fired plants for an exemption from the Notice of Intention (NOI) under Public Resources Code section 25540.6(a)(1)."[6] It should be noted that the Addendum was drafted in response to legislation that amended Section 25540.6 of the Public Resources Code by, *inter alia*, repealing previous requirements that limited the NOI exemption to projects under 300 MW and also adding the provisions allowing NOI exemptions for natural gas-fired projects that are "the result of a competitive solicitation or negotiation." (AB 1884; Statutes of 1993) In the Addendum, the Commission stated that AB 1884 "...reflects the...view that the 12-month period for an NOI should not hamper or delay the development of competing natural gas-fired powerplants."[7]

In concert with this statement, the Commission expressed its preference for a "...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'."[8] This preference includes the specific direction that "...it is appropriate to consider realistically the many forms that competitive solicitations and negotiations are likely to take in a competitive electricity market."[9] The Commission offered further guidance by providing examples of actions constituting a "competitive solicitation":

> For example, a 'competitive solicitation' may be conducted not only by a utility, but also by organized pools of consumers. Similarly, what results from 'negotiation' may cover a variety of negotiated situations ranging from a project with a traditional

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[5] The Commission unanimously adopted the "Addendum to ER 94" (Docket No. 93-ER-94) on February 14, 1996 (Order No. 96-0214-09).

[6] 1994 ER Addendum, Revision 1, p. 1.

[7] *Id*., p. 2.

[8] *Ibid.*

[9] *Ibid.*

> power purchase agreement to one offering to sell into an established power pool on a real-time basis.[10]

The Commission also announced that requests for an NOI exemption will be considered on a case-by-case basis, through the investigation process already existing in the regulations.[11] Based on this policy, the Commission has determined that four proposed merchant powerplant projects are exempt from NOI requirements.[12]

The second major element of policy guidance provided by **ER 94** concerns the integrated assessment of need determination that has typically been addressed in the Commission's Electricity Reports. In this regard, the Commission stated:

> We regard AB 1884 as an important change in the philosophy underlying the requirement of need conformance, in which the Legislature has indicated that the forces of competition are an adequate (and perhaps superior) alternative to governmental attempts to determine what is in the best interests of ratepayers. (**ER 94**, p. 133).

In **ER 96**, the Commission continued the essence of **ER 94**'s hands-off approach for proposed powerplants that do not put ratepayers at financial risk. (**ER 96** at p. 71). The only need criterion adopted in **ER 96** was to limit the total amount of megawatts permitted on a statewide basis during the pendency of **ER 96** to 6,737 MW. (*Id*., pp. 71-72). Further, the Commission announced that demonstrating conformance with the integrated assessment of need should be simplified so that "need conformance" does not stand in the way of investors willing to risk capital. (*Id*., p. 73). The Commission anticipated, however, that conditions may change in the long term and it may eventually be appropriate to impose more stringent need requirements for power facilities. (*Ibid*.)

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[10] *Id*., pp. 2-3. This policy logically anticipates the PX which was created by AB 1890 (Stats. 1996) to serve as the clearinghouse for the competitive market by providing an "efficient competitive auction open...to all suppliers... ." (Pub. Util. Code, § 355).

[11] *Id*., p. 3; see Cal. Code of Regs., tit. 20, §§ 1230-36.

[12] Otay Mesa (Order No. 96-1211-6); High Desert (Order No. 97-0305-04); Calpine (Order No. 97-0625-02); and Sunlaw Cogeneration Partners I (Order No. 97-1105-02). In each of those proceedings, the petitioners submitted letters of intent indicating evidence of negotiations to sell power directly to wholesale or retail power markets.

III. SUMMARY OF PARTIES' POSITIONS

In the present matter, La Paloma asserts that the project will sell all or some of its energy to the PX which solicits energy bids on an hourly basis. Since the PX has only recently begun operations[13], however, the assertion that hourly bids for energy sales constitute a "competitive solicitation or negotiation for new power resources" is a matter of first impression for the Commission. In consideration of the issues raised in La Paloma's Petition, the Committee issued the following inquiries to the parties:[14]

1. Is it Petitioner's position that the proposal to construct and operate a new gas-fired merchant powerplant to sell energy through the California Power Exchange creates an irrebuttable presumption that such proposal is the result of a competitive solicitation or negotiation?

2. What specific elements of the PX process support the conclusion that solicitations from the PX constitute a "negotiation" for new generation resources?

    a. 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"?

    b. Is Petitioner negotiating with any other potential power purchasers or power exchanges?

3. Explain the process by which the PX submits its "hourly" solicitations and how does the existence of those solicitations indicate that Petitioner's project will be included in the solicitation process?

    a. Specifically, explain the bidding process relative to "day ahead" bidding and "hourly" bidding, and how the Petitioner's project is anticipated to perform under both scenarios.

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[13] Although the PX was slated to commence operations on January 1, 1998, the Commission takes administrative notice that the bidding process actually began on March 31, 1998. (See, Pub. Util. Code, § 330(l)(4)).

[14] See, June 29, 1998, Request for Clarification.

4. Is there a nexus between the PX's solicitations for "hourly bids" and the particular project proposed by Petitioner, supporting the assertion that the project was proposed because of these solicitations?

5. Explain how the Petitioner's negotiations will be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner and Staff responded to these inquiries in their July 15 statements to the Committee. At the Committee hearing, both Petitioner and Commission Staff provided oral and written testimony and other evidence that was admitted into the record.[15] As requested by the Committee, the parties' testimony focused on the inquiries.

Petitioner. Petitioner sponsored sworn testimony[16] and presented legal argument regarding the relationship between the proposed project and the PX. No one objected to or discredited this presentation.

Petitioner alleged that its proposed powerplant is the result of "the creation of the California Power Exchange, which solicits energy bids on an hourly basis." (Exhibit 1). Petitioner asserted that the PX functions as a forward market for electricity sales. The continuous nature of the solicitations in the "day-ahead" and "hour-ahead" markets establishes a "marketplace where negotiations of price and quantity exist" on the open market. (Exhibit 3, Response to Question 1). Petitioner asserted that the existence of the PX supports the development of merchant projects such as La Paloma. (*Ibid*.)

In response to Question 1 (whether the proposal to construct a merchant powerplant to sell energy to the PX creates an *irrebuttable presumption* that such proposal is the result of a competitive solicitation), Petitioner argued that the Legislature could not have foreseen the creation of the PX when Section 25540.6 was amended by AB 1884 in 1993 to require evidence that a prospective

[15] The Exhibit List is attached as Appendix A.

[16] Testimony was provided by Roger Garratt, Manager, Project Development for the U.S. Generating Company (US Gen) and Project Manager for the La Paloma project, and by Curtis Hatton, Manager, Market Assessment for US Gen.

project is "the result of a competitive solicitation." AB 1890, however, provides that the PX shall provide an efficient "competitive auction" open to all power producers. (See, Pub. Util. Code, section 355). Petitioner asked the Committee to conclude that "solicitation" and "auction" are fundamentally the same since both mechanisms were designed to provide power at an acceptable price without the benefit of ratepayer support or guarantees. Petitioner further argued that the auction would reward the lowest bidders, thus resulting in competitive market pricing. The daily and hourly series of auction prices thus represent, in Petitioner's view, a de facto negotiation between the market and the energy producer. (Exhibit 3, Response to Question 1).

Petitioner recommended, however, that in the interest of caution, the Commission continue to review requests for NOI exemptions on a case-by-case basis and not adopt a blanket exemption for merchant projects. (Exhibit 3; RT: 27-28, 30-31).

In response to Question 2 (regarding how the PX process constitutes a "negotiation or solicitation") and Question 3 (regarding how the PX conducts business), Petitioner explained that the PX presently conducts a "day ahead" market and is currently developing an "hour-ahead" market. These events constitute a continuous competitive marketplace where negotiations of price and quantity occur between suppliers and consumers. (Exhibit 3; RT: 22).

Regarding PX registration status, Petitioner argued that since La Paloma has access to the PX, it is not necessary to be formally registered. (RT: 29-30). Two affiliates of US Gen (La Paloma's parent company), i.e., PG&E Energy Services and PG&E Energy Trading, are registered participants who market and sell power on the PX. (Exhibit 3; RT: 16-17; See also, footnote 19, below). Petitioner submitted a letter from PG&E Energy Trading-Power L.P. which indicates that power produced by the La Paloma project can be profitably marketed on the PX. (Exhibit 4). Petitioner does not, however, have any firm power sales agreements in place. (Exhibit 3).

In response to Question 4 (regarding whether there is a nexus between PX "solicitations" and the La Paloma project) Petitioner argued that the liquid wholesale market created by the PX is essentially

a series of solicitations. (RT: 22). Since the PX operates with tens of thousands of megawatts on an hourly basis, Petitioner's market forecasting analysis has shown that the proposed project is viable as a baseload facility. (*Ibid*.) In response to Question 5 (regarding the impact of "congestion" and "ancillary services"), Petitioner asserted that the baseload project will be impacted primarily by hourly energy prices, rather than congestion or ancillary service market activities. (Exhibit 3; RT: 20-21).

Finally, Petitioner does not anticipate any risk to ratepayers in the construction and operation of the proposed project. (RT: 18).

Staff. In its July 15, 1998 written statement, Staff agreed with Petitioner's assertions that the project is a natural gas-fired powerplant that "meets the statutory test for being the result of a competitive solicitation... ." Staff asserted that the PX is the "very quintessence of a competitive solicitation" based on Commission policy set forth in the Addendum to **ER 94**. (Exhibit 7). Since the operation of the PX is an ongoing competitive solicitation in which La Paloma intends to participate, Staff recommended that the Committee approve the Petition for an NOI exemption. Staff also agreed with Petitioner that ratepayers are not at risk for this project. (RT: 38-40).

IV. DISCUSSION

The Committee views its task in the present proceeding as a narrow one, i.e. to determine whether the La Paloma Generating Project fits within the statutory requirements for an exemption from the NOI review in light of existing Commission policy.

The statutory requirements are specified in PRC, section 25540.6(a)(1):

> (a) Notwithstanding any other provision of law, no notice of intention is required...for any of the following:
>
> (1)...a thermal powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... .

This provision contains both technological and market entry qualifications. La Paloma's project is designed as a natural gas-fired combined cycle powerplant, nominally 1,048 MW in capacity.[17] This meets the technological requirement of the statute. Therefore, the sole remaining matter for resolution is whether the project meets the market entry qualification, i.e. whether it is "the result of a competitive solicitation or negotiation for new generation resources".

In determining whether the prospective project is "the result of a competitive solicitation or negotiation", we could take the view that signed (and thus negotiated) contracts or agreements are a prerequisite to an NOI exemption. This, however, is neither necessary nor appropriate. In the newly restructured marketplace, power sales may be negotiated with the PX on a real-time basis. It would be unrealistic to require executed contracts or agreements in the context of the presently developing market created by AB 1890 since a power producer will no longer necessarily sell to a discrete consumer or utility but rather, through the PX, can effectively sell its power statewide. Contracts with individual customers are similarly unrealistic at the present time due to the evolving nature of electricity markets.

If, however, it is unrealistic to expect executed contracts or agreements in the present situation, what will suffice to meet the statutory requirements? In the Addendum, the Commission has anticipated the circumstances currently before us and directed a broad construction of the terms "competitive solicitation or negotiation" under Public Resources Code section 25540.6(a)(1) in order to advance

[17] The project consists of four power islands that include four separate combined cycle natural gas-fired turbine generators, heat recovery steam generators with 100-foot tall stacks, steam turbines, and ancillary facilities. A new 13.6 mile, double-circuit, bundled 230 kV transmission line will be used to interconnect the project with the Midway Substation. From Midway, the electricity will be transmitted through the existing distribution network. (Exhibit 2).

declared legislative purposes.[18] This statute includes a prospective element which must be given effect, where appropriate, in order to be consistent with the state's recent entry into the restructured electricity marketplace.

Therefore, we turn to credible indications that a project proponent is developing a project as the result of its business judgment, accompanied by a showing that negotiations - whether completed or prospective - are a part of that judgment. The record shows that Petitioner is the wholly owned subsidiary of U.S. Generating Company (US Gen), an established company with significant experience and assets involved in power generation acquisition, development, ownership, and operation.[19] Two affiliates of US Gen have registered with the PX. PG&E Energy Trading, the marketing affiliate, believes that "the power produced from a high efficiency plant in the Western Kern County area can be profitably sold into the ... Power Exchange... . We also believe that the output can be sold in the bilateral market for energy, which has developed outside the exchange." (Exhibit 4). The fact that La Paloma has access to the PX and other wholesale power markets through the affiliates of US Gen demonstrates the project's economic viability and supports a finding that Petitioner has exercised good business judgment in this case.

A question was raised as to whether, as Petitioner argued, we can conclude that the project is the result of a "competitive solicitation" within the meaning of the Section 25540.6 and Commission policy. AB 1890 established the PX to provide a "competitive auction", resulting in competitive market pricing at no risk to ratepayers. Informed business judgment anticipates the realities and

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[18] In adopting the Addendum, the Commission was presumably aware of the ambiguities inherent in the statute which was amended in 1993 during the pendency of the BRPU. It is not the Committee's task to reopen consideration of the Addendum, but only to apply its guidance in the present instance. See the Committee's Additional Recommendation, below.

[19] US Gen is one of five business units under the PG&E Corporation; the other four include: PG&E Energy Trading; PG&E Energy Services; PG&E Energy Gas Transmission; and the PG&E regulated utility. US Gen has developed 18 power projects with a cumulative output of over 3,500 MW in commercial operation during the last 10 years. Although none of these 18 projects is located in California, US Gen was an active participant in the California Public Utilities Commission's BRPU process, which included PG&E's regulated utility. Petitioner expects that the affiliated companies of PG&E Corporation will primarily be responsible for the marketing and sales of its energy production. (RT: 13-15).

economics of the restructured market as envisioned by the Commission and, under these circumstances, merchant facilities such as La Paloma will be developed to participate in the PX auction. This auction consists of a series of virtually instantaneous negotiations in which power marketers compete for the lowest bids in the "day-ahead" and "hour-ahead" markets. (Exhibit 3, Response to Question 3; Exhibit 7). We conclude, therefore, that the creation of the PX, which promotes a competitive wholesale market, should be viewed as a continuing series of solicitations or negotiations.

This view comports with purposes of both Sections 25540.6 and AB 1890, i.e., to foster power production that is competitively priced and does not put ratepayers at risk. At the present time, power producers are no longer subject to the solicitation process that existed under the Biennial Report Plan Update (BRPU); rather, that process was replaced by the competitive market established by AB 1890. Both statutes, however, were intended as steps toward the development of a competitive electricity market. We believe this goal must remain foremost when interpreting the overall statutory scheme.

Accordingly, we conclude that La Paloma's project is the result of the competitive auction which is a continuing series of solicitations or negotiations. While we conclude that a merchant plant such as La Paloma, which does not put ratepayers at risk, would generally be eligible for an NOI exemption, we wish to state clearly that we do not hereby establish an *irrebuttable presumption* that all merchant plants can be deemed exempt. We will continue to review requests for NOI exemptions on a case-by-case basis in accordance with the guidance of **ER 96** which refers to the process described in the Addendum to **ER 94**.

The necessarily prospective element inherent in the restructured electricity market and in the potential for future sales to the PX and other customers, persuade us that Petitioner has satisfied the market entry qualification of the statute. Therefore, in this case, and given the presently emergent nature of the competitive marketplace, we believe Petitioner has demonstrated sufficient indications of its

viability to establish that La Paloma's proposed powerplant project is the "result of a competitive solicitation or negotiation" within the meaning of Public Resources Code section 25540.6(a)(1).

On a procedural matter, the Committee notes that Petitioner filed an AFC for the La Paloma project on July 10, 1998, prior to the July 21 Committee hearing on this exemption petition and well in advance of the full Commission's action on the matter. Under the statutory scheme established in the Warren-Alquist Act, a logical reading would conclude that the NOI and AFC requirements constitute a two-stage process. (PRC, section 25502). The NOI process must be completed *before* the AFC can be filed unless a proposed project fits within one of the specific exemptions listed in PRC, section 25540.6.[20]

When La Paloma's AFC was filed on July 10, the Commission had not yet declared the project exempt under this provision. Indeed, as in the previous four NOI exemptions, [21] this type of case requires a hearing and Commission determination in order to ascertain whether a particular project is factually eligible for the single phase AFC licensing process. If, in another case, an applicant filed its AFC prior to Commission review of its exemption petition and that petition were not granted, that hypothetical applicant's AFC would clearly be ineligible for processing. The same logic applies to this matter.

Accordingly, we find that La Paloma is not eligible to file an AFC until the Commission has issued a determination that the project is exempt from NOI requirements. We recommend, therefore, that the AFC filing date occur after the Commission rules on the instant Petition, and that the data adequacy review period commence as of the filing date. (See, Cal. Code of Regs., tit. 20, section 1709).

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[20] The *specific* exemptions include: cogeneration; solar; modification of existing facility; site specific; less than 100 MW; or demonstration project. The remaining exemption is a gas-fired powerplant that is the "result of a competitive solicitation or negotiation."

[21] See, footnote 12, *ante*.

V. ADDITIONAL RECOMMENDATION

La Paloma's Petition represents, in the Committee's view, an extension of the NOI exemption rationale that was first expressed in the December 1996, Decision on Otay Mesa's petition for an NOI exemption. (Docket No. 96-SIT-1). Although Otay was a participant in the BRPU process which was addressed by the provisions of AB 1884, subsequent exemption decisions have interpreted the criteria more broadly. In each case, the Commission was anticipating the type of competitive marketplace that would actually develop. Nevertheless, we believe that each of those decisions, including the present one, are consistent with the Commission's adopted policy guidance in both **ER 94** and **ER 96**.

In applying this guidance, however, we recognize that certain elements contained in that policy may require reexamination and potential modification, reaffirmation, or clarification now that the competitive marketplace has become a reality. For example, the Committee believes that Commission policy as expressed in **ER 94** and the Addendum may need to be further explicated in light of AB 1890 and the application of the Addendum's principles more specifically addressed by the Commission as direction to Committees, Staff, and project proponents.

Next, **ER 96** presently contains a 6,737 MW limit for needed generation resources. Based on the current level of development activity, we believe it is reasonable to address the possibility that projects seeking certification during the pendency of **ER 96** could exceed this limit. Since the Commission has indicated that it may be necessary to require a more rigorous showing of need (**ER 96** at p. 73), we submit that review of this matter should be accelerated in light of the large projects that are already being filed.

Therefore, the Energy Facility Siting Committee shall immediately move to examine the propriety and necessity of modifications to the NOI exemption process and offer recommendations to the Commission as appropriate.

V. FINDINGS and CONCLUSIONS

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

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, section 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, section 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, section 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).

7) Petitioner filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the Addendum and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.

8) Petitioner proposes to construct a natural gas-fired combined cycle powerplant, nominally rated at 1,048 MW.

9) The powerplant will be located in an oil production area of Kern County, 2 miles east of the town of McKittrick, and approximately 35 miles west of Bakersfield.

10) The development of Petitioner's proposed powerplant as a merchant project does not put ratepayers at risk.

11) Petitioner is the wholly owned subsidiary of U.S. Generating Company (US Gen), which is one of five affiliated business units under the PG&E Corporation. US Gen has developed 18 power projects with a cumulative output of over 3,500 MW in the last 10 years.

(12) Petitioner has access to the PX market through the affiliates of US Gen.

(13) Petitioner has demonstrated sufficient indications of market viability to establish that the project is the "result of a competitive solicitation or negotiation."

14) The Warren-Alquist Act (PRC, sections 25500 et seq.) envisions a two-stage project review process in which the NOI proceeding must be completed before an Application for Certification (AFC) proceeding may commence.

15) Petitioner filed an AFC on July 10, 1998, prior to the Committee hearing and final disposition of the instant Petition for an NOI exemption.

16) Petitioner's AFC is not eligible to be filed until the Commission adopts this Proposed Decision granting the Petitioner an exemption from the NOI process.

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We conclude that La Paloma's proposed powerplant project is the "result of competitive solicitation or negotiation" for the sale of its power. Under these circumstances, and in light of the factors mentioned above and discussed elsewhere in this Decision, the prospective La Paloma powerplant qualifies for an exemption from the Notice of Intention as set forth in Public Resources Code section 25540.6(a)(1).

Dated: July 31, 1998

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Original signed by:

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

DAVID A. ROHY, Ph.D.
Vice Chair and Associate Member
Energy Facil

STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:

La Paloma Generating Company's	)	DOCKET NO. 98-SIT-1
Petition for Jurisdictional Determination	)	
under Public Resources Code	)	DISSENTING OPINION
Section 25540.6	)	

The Committee states, in section V (p. 14) of its proposed decision on the Petition for Jurisdictional Determination (Petition), that the Petition represents an extension of the NOI exemption rationale. The Committee concludes that La Paloma, the Petitioner, qualifies for an exemption from the states Notice of Intent (NOI) requirements, but at the same time, recommends that the Commissions Energy Facility Siting Committee immediately move to examine the propriety and necessity of modifications to the NOI exemption process. [p. 15] The Committee further recommends that the Commission reconvene the ***1996 Electricity Report*** (***ER 96***) Standing Committee to review the integrated assessment of need. [p. 15]

In my view, the Commission should evaluate the risks associated with its latest interpretation of Assembly Bill 1884 (Chapter 1108, Statutes of 1993 [AB 1884]), as reflected in the ***1994 Electricity Report*** (***ER 94***) and ***ER 96***, before it agrees to extend the rationale further. I am concerned, in part, because the Committee appears to believe the NOI process is no longer necessary. While I believe the NOI and the Application for Certification (AFC) processes merit evaluation, neither the Legislature nor the Commission has yet determined that the NOI process is unnecessary, yet, for all intents and purposes, that will be the result of this decision for natural gas-fired powerplants, if approved.

Before making such a determination, the Commission should carefully review the relationship between the Integrated Assessment of Need, the NOI, and the AFC[22]. In the Warren-Alquist Act, it is the relationship among these three Commission functions that justifies any state interest in powerplant certification[23] as opposed to returning the latter functions to local jurisdictions without any input from the state on the former function.

[22] The Commission would subsequently have to convince the Legislature to do the same.
[23] This also justifies the Commission's role, rather than locals', as lead agency in the California Environmental Quality Act (CEQA).

What follows is what I believe AB 1884 does and does not do, what the Commission, therefore, can and cannot do, and what I believe we need to consider, relative to our mandate, in evaluating this Petition.

Applicability of AB 1884

To use AB 1884 as the basis for granting an NOI exemption, the Commission must look at the law in its entirety and, in so doing, assure itself of the reasonable applicability of the NOI exemption provisions to the subject applicant. AB 1884 modified various provisions of the Warren-Alquist Act—relating to project need and NOI exemptions, which are:

- that the statement of need in the applicants AFC include, where applicable, a statement that its project was the result of a competitive solicitation which was consistent with the Commissions integrated assessment of need;
- that the Commissions findings regarding a proposed projects conformity with the Commissions integrated assessment of need include, where applicable, whether the project was the result of a competitive solicitation which was consistent with the Commissions integrated assessment of need;
- that the Commission affirmatively find an applicants proposed project conforms with its integrated assessment of need, if the project is the result of a competitive solicitation which was consistent with the Commissions integrated assessment of need. (AB 1884 made similar modifications to the Commissions required small powerplant exemption findings);
- that a proposed natural gas-fired project need not file an NOI if it was the result of a competitive solicitation or negotiation which was consistent with the Commissions integrated assessment of need.

I believe the proposed decision goes beyond these provisions in that law. I, therefore, cannot support its approval. If the Commission believes the NOI process is no longer necessary, and I am not convinced of that, it should sponsor legislation to that effect.

The Independent Energy Producers Association (IEP) sponsored, and Assemblymember Byron Sher authored, AB 1884 in early 1993, just as the California Public Utilities Commission (CPUC) was about to finalize the first Biennial Resource Plan Update (BRPU) of the utilities Standard Offer Number 4. At the same time, the Sacramento Municipal Utility District had an outstanding competitive solicitation for new resources to meet its future needs. Other publicly owned utilities were in various stages of competitive solicitations, as well. Following completion of its ***1992 Electricity Report***, the Commission participated actively in the CPUCs BRPU proceeding and was reasonably successful in defending its basis for determining each investor-owned utilitys need for new resources in that proceeding.

Under existing law at the time, winners in these solicitations faced some daunting regulatory prospects once they emerged from that competition. First, the Commissions Electricity Report process takes two years to complete, and the CPUCs process, or its public-utility equivalent, an average of an additional year to complete. Second, except in certain cases (typically cogeneration and solar thermal facilities), the winning project would have to file an NOI, a process which takes one year to complete. Finally, once the applicant successfully completed its NOI process, it had

to file an Application for Certification (AFC), another one year process. Most significantly, within the AFC, the Commission had to determine that the proposed facility conformed with the Commissions most recent need forecast in order to issue the applicant a permit. Following these steps, an applicant faced the possibility that its proposal—authorized by the CPUC or a public-utility board, and consistent with the Commissions then-current need forecast—could fail to conform with the CECs most recent need forecast which the Commission completed between the time the applicant received its authorization from the CPUC or utility board, and it received its NOI decision. To address this narrow area of conflict, the Legislature modified the law with AB 1884.

The question before us today is whether these are the circumstances the Petitioner now faces. I conclude they are not. Applicants do not need to endure a lengthy and uncertain solicitation process. Quite the contrary, applicants, according to the proposed decision, need only take advantage of the existing California Power Exchange or some alternative electricity pool to conform with demand—this is part of the existing market structure, and I have no objection to it. However, it is hardly a circumstance that warrants allowing applicants to circumvent what I consider to be an important adjunct to the permitting process.

Addendum to *ER 94* and Its Applicability during the Pendency of *ER 96*

I am familiar with, and in fact signed, the Addendum to ***ER 94***. However, I believe this addendum is open to many interpretations. Furthermore, I believe it incorrectly represented the intent of AB 1884 where it stated that, the forces of competition or the act of negotiation with competing developers should produce projects for which the NOI process of selecting three alternative sites is an unnecessary governmental action for environmental or ratepayer protection. [p. 2] If one further argues that we should broadly construe the intent of AB 1884 through the phrase the result of a competitive solicitation or negotiation to include sales to the California Power Exchange or some similar arrangement, there is essentially no feasible circumstance in which the Commission would require an NOI[24]. [pp. 2-3]

There is a second, more curious, requirement in the addendum, i.e., that the Commission determine applicants eligibility for NOI exemptions on a case-by-case basis, rather than by regulation. While I am extremely uncomfortable with this requirement, I believe it is the only provision of the addendum to survive with the adoption of the ***ER 96***. I argue this is true because there is only one passage in ***ER 96*** relating to this issue: For gas-fired powerplants which are the result of competitive solicitations or negotiations, we will continue our *process* for granting exemptions from NOI requirements to such projects. [***ER 96***, p. 75, endnote 1] (emphasis added) I interpret this to mean, I believe quite appropriately, that the Commission will continue to make these determinations case by case, since this is the only process described in the addendum—the rest is policy. While the proposed decision correctly states there is no indication that the Commission intends to evaluate NOIs differently during the pendency of ***ER 96***, I conclude that there was no discussion of the issue at all in ***ER 96*** and that the footnote quoted above was an afterthought.

The Role of the NOI in the Energy Facility Siting Process

The Commission has exclusive authority to certify all in-state, thermal powerplants of 50 MW or more. The Commissions site certification process is completed in two phases: an NOI to file an AFC, and the AFC itself. Final certification depends on the Commissions assessment of need which is carried out in its Electricity Report process.

The 12-month NOI process includes public hearings in which affected parties are invited to participate. Filing the NOI signals a developers intention to file an AFC. The applicant must include a minimum of three alternative sites and their related facilities in the filing. The purpose of an NOI is to determine the suitability of the proposed sites to accommodate the project, the relative merits of the alternative sites, and the general conformity with standards and the Commissions assessment of need, as adopted in the most recent Electricity Report.

The Commission will only consider those sites that conform with applicable standards. This includes conformity with all applicable laws, ordinances, regulations and standards, including long-range, land-use plans and guidelines. Acceptable alternatives must also conform with any

[24] The fact is that natural gas-fired powerplants are today's conventional resource.

findings and comments submitted by the California Coastal Commission and the San Francisco Bay Conservation and Development Commission. The Commissions final report contains findings on the acceptability and relative merit of each alternative site and findings and conclusions with respect to the safety and reliability of the project at each of the sites.

The Commission may approve an NOI if it finds at least two alternative sites are acceptable. The project proponent is then eligible to file an AFC with the Commission. The Commission acts as the lead agency and performs an environmental impact review consistent with the California Environmental Quality Act (CEQA) during the AFC process.

CEQA also requires an analysis of alternatives to the proposed project, but the process of considering alternative sites in the NOI differs from the alternatives analysis conducted in the CEQA process in a significant way: it is not the intent of the CEQA alternatives analysis to find an additional feasible site for the project. Rather, the purpose for this analysis is to determine whether an alternative site could reduce or eliminate the significant adverse environmental impacts associated with a project, as proposed. The lead agency must analyze a no project alternative for the same reasons. A reasonable range of alternatives allows decision makers to compare the effects of developing a project at the proposed site with those of another site.

An important question to consider, but not resolve in this decision, is whether the NOI process is a burden or a benefit. I submit that many merchant plants would benefit from the NOI process and its ability to establish the eligibility of sites for future development of a powerplants and related facilities. Many of the applications the Commission is reviewing, or will soon begin to review, face uncertainties because they are trying to perform both the NOI and the AFC functions at once. If applicants filed NOIs first, they would be able to pursue already approved sites at the appropriate pace.

Conclusion

For these reasons, I believe the Commission should deny Petitioners request for an exemption from the NOI process. For the benefit of the Commission, La Paloma and future petitioners, we should act on the Energy Facility Siting Committees recommendation to examine the NOI process as well as the appropriate conditions under which an applicant would be exempted.

Original signed by:

DATED: August 12, 1998

MICHAL C. MOORE
Commissioner

APPENDIX A

Exhibit List

STATE OF CALIFORNIA
Energy Resources Conservation and Development Commission

In the Matter of:	)	**Docket No. 84-AFC-2C(A1)**
	)	
La Paloma Generating Company, LLC	)	**EXHIBIT LIST**
Petition for Jurisdictional Determination	)	***(7/21/98)***
(CCPA No. 1)	)	
_____	)	

EXHIBIT 1: Document entitled, "Petition of La Paloma Generating Company, LLC For Interpretation and Clarification of California Public Resources Code, Section 25540.6 Pursuant to 20 CCR 1231. Submitted by Petitioner to the Energy Commission on June 11, 1998. Identified and received into evidence on July 21, 1998.

EXHIBIT 2: Document entitled, "La Paloma Generating Facility Project Description". Submitted by Petitioner to the Energy Commission on July 15, 1998. Identified and received into evidence on July 21, 1998.

EXHIBIT 3: Responses to Committee Questions 1 through 5 submitted by Petitioner on July 15, 1998. Identified and received into evidence on July 21, 1998.

EXHIBIT 4: Letter from Sarah M. Barpoulis, PG&E Energy Trading to Roger Garratt, dated July 9, 1998. Identified and received into evidence on July 21, 1998.

EXHIBIT 5: Prepared Direct Testimony of Roger Garratt submitted by Petitioner. Identified and received into evidence on July 21, 1998.

EXHIBIT 6: Prepared Direct Testimony of Curtis A. Hatton submitted by Petitioner. Identified and received into evidence on July 21, 1998.

EXHIBIT 7: Energy Commission Staff Statement submitted to the Energy Commission on July 15, 1998. Identified and received into evidence on July 21, 1998.

APPENDIX B

Proof of Service

STATE OF CALIFORNIA

State Energy Resources Conservation
and Development Commission

In the Matter of:	**)**	**Docket No.: 98-SIT-1**
	)	
La Paloma Generating Company, LLC	**)**	**PROOF OF SERVICE**
Petition for Jurisdictional Determination		***[Established 6/11/98]***
_____)		

I, SANDRA M. HARRIS declare that on AUGUST 14, 1998, I deposited copies of the attached COMMISSION FINAL DECISION -with- DISSENTING OPINION in the United States mail in SACRAMENTO, CA with first class postage thereon fully prepaid and addressed to the following:

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CALIFORNIA ENERGY COMMISSION
Docket Unit - 12 Copies Required

DOCKET UNIT, MS-4
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ATTACHMENT A

Interested Individuals, Organizations
and Businesses *(See next page)*

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

_____
(Signature)

ATTACHMENT A

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