

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION

In the Matter Of:)
)
Application for Certification for the) Docket No. 03-AFC-2
Los Esteros Critical Energy Facility)
Phase I Relicense)
)
)
_____)

COMMISSION STAFF BRIEF REGARDING RECERTIFICATION
OF EXISTING FACILITY

This brief addresses the issues set forth in the Committee’s May 21, 2004, Briefing Order.

Issue 1: When does the three-year period begin to run for a license issued subject to Public Resources Code Section 25552?

The Los Esteros power plant is a “peaker” facility licensed pursuant to the temporary provisions of the four-month licensing process of Public Resources Code Section 25552.¹ This process required a “binding and enforceable agreement with the commission . . . (A) That the thermal powerplant will cease to operate and the permit will terminate within three years [or] (B) That the thermal plant will be recertified, modified, replaced, or removed within a period of three years with a cogeneration or combined-cycle thermal powerplant” (§ 25552(e)(5).) The Briefing Order asks what event triggered the beginning of the three-year period for the current permit’s validity.

The statute provides no indication regarding whether time should begin to run from the issuance of the permit, the date the facility began operation, or some other triggering event. During the proceeding Staff and the applicant had discussed making the period of validity three years from the “on-line” date of the facility, or alternatively, from the first turbine roll. However, these discussions were never formalized, and apparently never were made part of the Final Decision. Staff had suggested the “on line” date as the trigger because of the possibility of uncertainty regarding delays from litigation or other

¹ Former Section 25552 was repealed by its own provisions operative January 1, 2003. For convenience it is referred to simply as Section 25552. Unless otherwise indicated, all statutory references are to the Public Resources Code.

factors that could delay the beginning of construction. The only “binding” provision on this matter of which Staff is aware is Condition EFF-1 Power Plant Efficiency conditions² of the Final Decision, which reads as follows:

The project owner shall either convert the project to a combined-cycle generating facility employing best available air emissions control technology, or shall close the plant permanently, within a period of three years from the date of this Energy Commission Decision, in accordance of Public Resources Code Section 25552(e)(5)(B). (Commission Decision, p. 75.)

The Final Decision was approved and the license granted in July 2002. Thus, it would appear that the Commission interpreted the statute to mean that the three-year period for license validity began to run on the date of the Final Decision.

Issue Two: Can the “binding agreement” be modified if both parties (Applicant and the Commission) agree to the modification, for the purpose of extending the period for conversion to a combined cycle facility?

Section 25552 was repealed by its own terms, operative January 1, 2003, although the “binding agreements” referred to in the statute were by law to remain in force and effect. (Section 25552(f).) The binding agreement, as stated above, is set forth in a condition in the permit decision. Conditions in a power plant license are, at least as a general rule, subject to amendment. (Cal. Code of Regs., tit. 20, Section 1769.) Thus, arguably the applicant need only file for an amendment to the current license to extend the period of the binding agreement, assuming that the Commission would ratify the change. However, it is questionable whether the Legislature intended that a “binding agreement” be subject to amendment or nullification by the amendment process.

The legislative history of Section 25552 suggests that Commission amendment of the binding agreement was not intended. When it enacted AB 970, the Legislature was concerned about the air quality impacts of simple cycle projects, and therefore wanted such projects to be converted to combined-cycle facilities subject to more stringent BACT emission requirements. Thus, pursuant to AB 970’s original provisions, it is reasonable to conclude that a three-year license facility must shut down after three years unless it converts to operation as a combined cycle facility.

However, Section 25552 was amended by urgency legislation in 2001 in the form of SB 28x (Sher). As with AB 970, this urgency legislation was enacted during a period of intense interest in the Legislature concerning energy reliability and the need for additional electricity generation. SB 28x added critical words to Section 25552(e)(5)(B):

That the thermal powerplant will be recertified, modified, replaced, or removed within a period of three years with a cogeneration or combined

² A similar provision is found in AQ-38, an air quality condition apparently incorporated from the air district’s Final Determination of Compliance. (See Commission Decision, p. 144.)

cycle thermal powerplant that uses best available control technology and obtains necessary offsets

The language of the amendment is ambiguous. Clearly it intended to allow the owner of a project licensed pursuant to the statute to convert the project to either a cogeneration facility or a combined-cycle facility, thereby increasing flexibility. However, did inclusion of the term “recertified” mean that the Commission could also relicense the simple cycle peaker on a permanent basis? It is not clear that the term “recertified” in SB 28x achieves such an effect; such an inference would be much clearer had the amendment used the term “*recertified or* modified, replaced, or removed within a period of three years.” The latter phrase would make it clear that the term “recertified” intended that the simple-cycle facility could be relicensed to continue operation without conversion to a combined-cycle or cogeneration facility.

This ambiguity is resolved by the legislative history. Senator Sher’s office provided the Senate Energy, Utilities, and Communications Committee with a bill analysis on March 5, 2001, for SB 28x during the First Extraordinary Legislative Session. The Legislature held this extraordinary session because of its critical concern about electricity shortages and rate increases. The analysis for SB 28x states at the outset that “This bill contains a series of provisions intended to accommodate increased construction and operation of power plants.” With regard to the amendment language in Section 25552(e)(5)(B), the analysis provides as follows:

[The bill] Expands the application of the “peaker” process to allow re-certification or replacement by a cogeneration facility within three years. Under AB 970, simple-cycle peakers were required to be replaced by combined-cycle plants. (Sen. Energy, Util., and Commun. Com., 3d reading analysis of Sen. Bill 28x (2001-2002 First Extra. Sess.) as amended March 5, 2001, p. 3.)

The above language indicates intent to allow “recertification or replacement” as an alternative to converting the facility, an option not originally included in AB 970. Similar language reflecting this legislative intent is found in subsequent bill analyses preceding the enactment of the urgency measure. (See, e.g., Sen. Rules Com., 3d reading analysis of Sen. Bill 28x (2001-2002 First Extra. Sess.) as amended March 5, 2001; Ass. Com. on Energy and Cost Avail., analysis of Joseph Lyons, April 2, 2001 (2001-2002 First Extra. Sess.), as amended March 19, 2001.) Given this legislative intent to allow for recertification of a simple-cycle plant, the filing of a new application for “Phase 1 relicensing” is unquestionably appropriate.

Issue 3: Does the Commission retain “legal authority to license the simple-cycle facility under its regular certification authority—either temporarily or permanently—if it appears, for any reason, that the actual construction of the combined-cycle project may not be possible to be completed and operation commenced within the three-year period?”

This question is closely related to the answer to Issue 2, above. The answer to Issue 2 concludes that the Commission has legal authority to relicense (or “recertify”) the existing simple-cycle facility because of the SB 28x amendments to Section 25552. In addition, the Chief Counsel has publicly expressed his view that the Commission could relicense the Los Esteros peaker facility without regard to the amendments in SB 28x, based on its original licensing authority. (See letter from Chief Counsel William M. Chamberlain to Christopher Ellison, August 26, 2003, pp. 1-3.) Staff has no reason to disagree with the Chief Counsel’s conclusion on this matter, but notes that the SB 28x amendments and their legislative history indicate that the Legislature intended to expressly allow for recertification.

Respectfully submitted,

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