

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the)
LOS ESTEROS CRITICAL ENERGY FACILITY) Docket No. 03-AFC-2
PHASE 2)
(LOS ESTEROS 2))
_____)

**APPLICANT'S BRIEF IN SUPPORT OF RECERTIFICATION
OF THE SIMPLE CYCLE FACILITY**

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This Brief is filed pursuant to the Committee Order of May 21, 2004.

According to the Committee Order, Public Resources Code section 25552¹ “contemplated that all such projects [licensed pursuant to a “four-month” siting process] would have to commit to converting the simple cycle facilities to combined cycle (or cogeneration) operation to improve their efficiency, and in order to qualify for the expedited treatment, such facility applicants were required to enter into a binding agreement that they would either cease operation after three years or obtain certification of the anticipated cogeneration or combined cycle facility with best available control technology and all required offsets within that period.”

The Committee requested that the parties address three questions. The Committee’s questions and our responses are briefly summarized here:

- 1. Whether the Energy Commission retains legal authority to license the simple cycle project 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.**

Response: The Commissions’ General Counsel has advised that the Commission does retain the legal authority to license the simple cycle facility under its regular certification authority. It is under this authority that the Applicant has filed an application for certification of LECEF I.

¹ The full text of Section 25552 is set forth as an Attachment A to this Brief.

2. Can the "binding agreement" be modified if both parties (Applicant and the Energy Commission) agree to the modification, for the purpose of extending the period in which the cogeneration or combined cycle facility can come on line?

Response: Because the Commission has the authority to license the simple cycle facility under its regular jurisdiction, this question is moot. However, if the Committee chooses to address this question, it should be noted that the obligations of Section 25552 are not contained in a bilateral agreement; instead, these obligations are codified in the Conditions of Certification. The Commission clearly has the authority to modify the Conditions it has adopted.

Furthermore, as explained below, Condition EFF-1 does not accurately reflect the full terms of Section 25552 as amended. In its amended form, the Statute requires that the facility may be *recertified*, modified or decommissioned. In this application, we are seeking recertification of the facility under the Commission's general authority, as authorized by Section 25552.

3. When does the three-year period begin to run?

Response: If the Commission grants the new application for certification of LECEF I prior to June 30, 2005, this question is moot. However, if the Committee chooses to address this question at this time, the Committee should find that the three-year period began on the commercial operation date of March 7, 2003.

We have found no legislative history that states with certainty that the three-year period was intended to run from the commercial operation date, the date of the Commission's certification, or any other milestone date. Yet, for reasons not explained in the Commission's Decision on LECEF, the Commission chose to start the three-year period for LECEF from the date the license was issued (even before the Commission's LECEF Decision was final and non-appealable both administratively and judicially).

It is equally plausible and logical, however, that the Legislature intended that the three-year period run from the commencement of operations of the facility licensed under the expedited procedure. This interpretation would allow a three-year operations period for all facilities, regardless of the time required to license and construct the facility.

I. BACKGROUND: THE LEGISLATIVE HISTORY OF PUBLIC RESOURCES CODE § 25552

A. AB 970: Establishing the Four-Month Siting Process for a Limited Term.

AB 970, which was signed into law on September 6, 2000, added Section 25552 to the Public Resources Code. Section 25552 required the Energy Commission to implement a procedure for an expedited decision on certain simple cycle thermal power plants. The statute specified that the Commission shall issue its final decision within four months of the date it deems the application complete, or at any later time mutually agreed upon by the Commission and the Applicant. § 25552(c).

This section provided, in pertinent part, that:

[I]n order to qualify for the procedure established by this section, an applicationshall be complete by October 31, 2000, satisfy the requirements of Section 25523, and include a description of the proposed conditions of certification that will do all of the following:...

(4) A reasonable demonstration that the thermal powerplant and related facilities, if licensed on the expedited schedule provided by this section, will be in service before August 1, 2001.

(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 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.

In this form, the Statute required that the Application include a description of proposed conditions that will include a binding and enforceable agreement that demonstrates either that the thermal powerplant will terminate within three years or 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 necessary offsets.

B. SB 28x: Extending the Four-Month Siting Process and Allowing for “Recertification” of Simple Cycle Projects.

Section 25552 was amended by SB 28x, which became effective May 22, 2001. SB 28x made three significant changes to Section 25552.

First, it extended the date by which a project may be in service to December 31, 2002.

Second, it provided that if a simple cycle power plant is replaced, it may be replaced with either a cogeneration plant or a combined cycle plant.

Third, SB 28x provided that as well as being modified, replaced or removed, a simple cycle plant may be “recertified”:

25552(e)(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 *recertified*, modified, replaced, or removed within a period of three years with a cogeneration or combined-cycle thermal powerplant that uses best available control technology and obtains 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. (Emphasis added.)

Thus, as amended, Section 25552 provided that the Application must include a description of proposed conditions that will include a binding and enforceable agreement that demonstrates either (1) that the thermal powerplant will terminate within three years, (2) that it will be recertified or (3) that it will be modified or replaced within a period of three years with a combined-cycle thermal powerplant. As set forth below, the term “recertified” is significant to the options available to LECEF.

C. The Commission’s Final Decision

The Final Decision contains the following Condition of Certification:

EFF-1 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 with Public Resources Code Section 25552(e)(5)(B).

Verification: Within one year of the date of this Energy Commission decision, the project owner shall submit to the CPM, for review and approval, a schedule for submitting an Application for Certification for conversion of the project to a combined cycle facility employing best available air emissions control technology. Alternatively, within one year of the date of this Energy Commission decision, the project owner shall submit to the CPM, for review and approval, a schedule for submitting a

Facility Closure Plan. Either the AFC or the Closure Plan shall be pursued on a schedule that ensures that the project will be either converted to a combined cycle facility or permanently closed within three years of this Energy Commission decision. (LECEF Decision, pp. 75-76)

Although applicable law allows for the LECEF project to be “*recertified*, modified, replaced, or removed within a period of three years with a cogeneration or combined cycle thermal power plant” (Emphasis Added), Condition of Certification EFF-1 is more limited, requiring that “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.”

It is not clear why the Decision is more restrictive than the statute. It may be that the Commission was confused regarding the language of the Statute. At pages 8-9 of the LECEF Decision, the Commission presents a summary of the statutory language that reflects some awareness of the SB 28x amendments to Section 25552 that added the recertification option.² On the other hand, in the recitation of Applicable Laws in Appendix A to the LECEF Decision, the Commission quotes the original form of Section 25552 as originally enacted -- before it was amended by SB 28x. (LECEF Decision, Appendix A, p. 28.)

II. THE COMMISSION HAS AUTHORITY TO LICENSE THE SIMPLE CYCLE PROJECT UNDER ITS REGULAR CERTIFICATION AUTHORITY.

Recognizing the ambiguities in Section 25552, it was the Applicant’s intent to proceed pursuant to Commission direction. Therefore, prior to filing this Application, the Applicant sought guidance from the Commission’s General Counsel. By letter of August 26, 2003³, William M. Chamberlain opined as follows:

² The LECEF Decision summarizes 25552 as follows:

“Qualification and licensure for the four-month process contemplated by Section 25552 requires an AFC to demonstrate that the simple cycle, thermal power plant and related facilities will:

* * *

provide for a binding and enforceable agreement with the Energy Commission that demonstrates either (a) that the project will cease to operate, and its permit will terminate within three years, or (b) that within a period of three years, it will be recertified, modified, removed or replaced, with a cogeneration or combined cycle thermal power plant that (1) uses (BACT), (2) obtains necessary offsets according to the stated ratio (and consistent with federal law and regulation) or, where offsets are unavailable, pay an air emissions mitigation fee to the air pollution control district or air quality management district based upon actual emissions, for expenditure by the district under Section 44275 of the Health and Safety Code, to mitigate the emissions from the plant, and, (3) complies with all LORS.” (LECEF Decision, pp. 8-9.)

³ This Opinion, set forth as Attachment B to this Brief, is hereinafter referred to as the “Chamberlain Opinion.”

[S]ection 25552 is an optional fast track for simple cycle facilities that could have been licensed under the normal AFC process. There is no indication that Section 25552 was intended to require all simple cycle facilities to come through the fast track process. Therefore, it is possible to read Section 25552 within the broader licensing provisions of the Warren-Alquist Act to provide for a temporary license that does not remove the Commission's power, under its normal licensing process, to certify the facility as a permanent facility when and if the facts show that to be in the public interest. Had the Commission licensed the LECEF under the normal process, the facility could have remained a simple cycled project for its entire useful life. As you note, even though the project commenced its licensing under the fast track process, the proceeding took nine months and the license required full mitigation of the impacts of the facility. It would therefore be a very harsh result, and potentially not in the public interest, if the statute were interpreted to preclude the Commission from exercising its normal licensing powers to continue the operation of the facility following its construction. To do so could result in new clean and efficient simple cycled units having to cease their operation, potentially when the power is urgently needed, should the owner be unable to finance a conversion to a combined cycle facility within the three-year period prescribed by Section 25552. (Chamberlain Opinion, p. 2.)

Acting upon the guidance of the General Counsel, we have filed in this proceeding an application for certification of the simple cycle facility as a permanent facility within the broader licensing provisions of the Warren-Alquist Act and we have concurrently filed an application for the proposed conversion to a combined cycle facility.

III. SECTION 25552 PERMITS THE COMMISSION TO MODIFY OR EXTEND THE THREE-YEAR TIME PERIOD.

The Committee Ruling states that Section 25552 “clearly contemplated that all such projects [licensed under the expedited procedure] would have to commit to converting the simple cycle facilities to combined cycle (or cogeneration) operation to improve their efficiency, and in order to qualify for the expedited treatment, such facility applicants were required to enter into a binding agreement that they would either cease operation after three years or obtain certification of the anticipated cogeneration or combined cycle facility with best available control technology and all required offsets within that period.”

However, we believe that the “binding commitment” set forth in Section 25552 clearly allows a third alternative to modification or termination of the facility. Well-established rules of statutory construction confirm that when the Legislature added the term “recertified” to Section 25552 (in SB 28x), the Legislature intended that a simple cycle facility could be recertified, without the additional requirement that it be replaced

with a combined cycle facility. Although the potential environmental effects of the LECEF were fully analyzed using the same LORS that would apply in any regular twelve month proceeding, by using the four-month regulations the project could have been certified using, for example, air emission fees instead of ERCs. In allowing for recertification, it is apparent that the Legislature intended any projects licensed with such interim measures should be required to be recertified under the more rigorous twelve month siting process review.

The addition of the term “recertify” by SB 28x cannot be read as mere surplusage. Instead, the term “recertify” should be read as an additional process – one that would assure that any projects that receive expedited review would eventually be held to the same standards the project would be held to if it had been licensed under the Commission’s regular, non-expedited authority. Any other reading makes the term “recertified” a nullity, contrary to accepted rules of statutory construction that every word must be given meaning and effect and not read to be mere surplusage.⁴

A. The Rules of Statutory Construction Allow for “Recertification” of the Project as a Simple Cycle Facility as a Viable Alternative to Modification, Replacement or Removal.

Where a statute is susceptible to two different interpretations, California courts apply rules of statutory construction to ascertain the meaning of the statute. In construing statutes, the Courts turn first to the language of the statute itself and apply standard rules of construction. One such rule of statutory construction is that the Legislature is presumed to understand the meaning of the words in a statute. Where Section 25552 uses coordinating conjunction “or” rather than “and”, the Court will assume that the Legislature meant “or”. Thus, Section 25552 should be read to mean that a simple cycle plant may either be recertified *or* replaced with a combined cycle plant. The statute does not state that the simple cycle plant must be recertified *and* replaced with a combined cycle power plant. It would be inappropriate to substitute the word “and” for “or” in this statute.

The General Counsel believes that “the language is not very clear whether the legislature intended the addition of the term “recertified” (1) to allow recertification as a simple cycle with no change in the facility at all or (2) simply to restate the intention that the Commission would relicense the facility when it was being converted to a combined cycle or cogeneration facility.” (Chamberlain Opinion, p. 2.) The General Counsel prefers the latter interpretation. However, as we discuss above, where there is ambiguity in a statute, rules of statutory construction disfavor a presumption that words added to a statute merely restate the current statute and have no additional meaning.⁵

⁴ We avoid an interpretation that would render terms surplusage, but seek to give every word some significance, leaving no part useless or devoid of meaning. (*Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1260-1261; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54; *McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 210-211; *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, 435.)

⁵ "An amendment to a statute is usually designed to either add something to it or to limit its effect. Fresno

Finally, the Committee ruling suggests that the Legislature intended that simple cycle plants be required to improve their efficiency within three years as a condition of continued operation. However, we find nothing in the legislative history to support this supposition. There is no law which forbids the certification or construction of simple cycle facilities or that prescribes a specific level of efficiency as a condition of continued operation.

While LECEF did not actually benefit from the opportunity for an expedited proceeding (the Commission approved the LECEF in more than 9 months – not 4 months - after the Application was deemed data adequate), recertification will permit all interested parties a full opportunity to review the licensing conditions, even though they had such an opportunity in the previous proceeding. Therefore, the provision that certain facilities may be recertified, rather than simply be removed or replaced, is fully consistent with the intent of the Legislature, which enacted and subsequently amended Section 25552.

IV. WHEN DOES THE THREE-YEAR PERIOD BEGIN TO RUN?

If the Commission grants the new application for certification of LECEF I prior to June 30, 2005, this question is moot. However, if the Committee chooses to address the question at this time, the Committee should find that the three-year period runs from the date of commercial operation, which for LECEF I was March 7, 2003.

Neither the statute itself nor the legislative history state with certainty that the three-year period was intended to run from the commercial operation date, the date of the Commission's certification, or any other milestone date. Yet, for reasons not explained in the Commission's Decision on LECEF, the Commission chose to start the three-year period for LECEF from the date the license was issued (even before the Commission's LECEF Decision was final and non-appealable both administratively and judicially). We found nothing in the legislative history to support this most restrictive reading of Section 25552.

It is equally plausible and logical that the Legislature intended that the three-year period run from the commencement of operations of the facility licensed under the expedited procedure. This interpretation makes sense because it results in an equal three-year operations period for all facilities, regardless of the time required for licensing appeals and construction of the facility. This interpretation also makes sense because it avoids the possible absurd result that licensing appeals could cause the three-year period to run before the project could ever operate.

City High School Dist. v De Caristo 33 Cal.App.2d 666, 92 P.2d 668.

It is a settled principle of statutory construction that a material change in the phraseology of a legislative enactment is ordinarily viewed as showing an intention on the part of the legislature to change the meaning of the statute. Sacramento Typographical Union v State (3d Dist) 18 Cal.App.3d 634, 96 Cal.Rptr. 194.

V. CONCLUSION

In reliance upon the written Opinion of the Commission's General Counsel, the Applicant is seeking recertification of the simple cycle facility as a permanent facility within the broader licensing provisions of the Warren-Alquist Act, and has concurrently filed for certification of the proposed conversion to a combined cycle facility. As a matter of law, these applications are fully consistent with the spirit and the letter of Section 25552 and the Commission's broader licensing authority, as the General Counsel's Opinion makes clear. As a matter of policy, timely approval of these applications will avoid disruption of operations of LECEF I at the very time that the power from this modern, clean and efficient facility may be urgently needed in California.

June 7, 2004

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

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ATTACHMENT A

TEXT OF PUBLIC RESOURCES CODE SECTION 25552

1 25552. (a) The commission shall implement a procedure, consistent with Division 13 (commencing with Section 21000) and with the federal Clean Air Act (42 U.S.C. Sec. 7401 et seq.), for an expedited decision on simple cycle thermal powerplants and related facilities that can be put into service on or before December 31, 2002, including a procedure for considering amendments to a pending application if the amendments specify a change from a combined cycle thermal powerplant and related facilities to a simple cycle thermal powerplant and related facilities.

(b) The procedure shall include all of the following:

(1) A requirement that, within 15 days of receiving the application or amendment to a pending application, the commission shall determine whether the application is complete.

(2) A requirement that, within 25 days of determining that an application is complete, the commission, or a committee of the commission, shall determine whether the application qualifies for an expedited decision pursuant to this section. If an application qualifies for an expedited decision pursuant to this section, the commission shall provide the notice required by Section 21092.

(c) The commission shall issue its final decision on an application, including an amendment to a pending application, within four months from the date on which it deems the application or amendment complete, or at any later time mutually agreed upon by the commission and the applicant, provided that the thermal powerplant and related facilities remain likely to be in service on or before December 31, 2002.

(d) The commission shall issue a decision granting a license to a simple cycle thermal powerplant and related facilities pursuant to this section if the commission finds all of the following:

(1) The thermal powerplant is not a major stationary source or a modification to a major stationary source, as defined by the federal Clean Air Act, and will be equipped with best available control technology, in consultation with the appropriate air pollution control district or air quality management district and the State Air Resources Board.

(2) The thermal powerplant and related facilities will not have a significant adverse effect on the environment or the electrical system as a result of construction or operation.

(3) With respect to a project for a thermal powerplant and related facilities reviewed under the process established by this section, the applicant has contracted with a general contractor and has contracted for an adequate supply of skilled labor to construct, operate, and maintain the thermal powerplant.

(e) In order to qualify for the procedure established by this section, an application shall satisfy the requirements of Section 25523, and include a description of the proposed conditions of certification that will do all of the following:

(1) Assure that the thermal powerplant and related facilities will not have a significant adverse effect on the environment as a result of construction or operation.

(2) Assure protection of public health and safety.

(3) Result in compliance with all applicable federal, state, and local laws, ordinances, and standards.

(4) A reasonable demonstration that the thermal powerplant and related facilities, if licensed on the expedited schedule provided by this section, will be in service before December 31, 2002.

(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 recertified, modified, replaced, or removed within a period of three years with a cogeneration or combined-cycle thermal powerplant that uses best available control technology and obtains 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.

(6) Where applicable, that the thermal powerplant will obtain offsets or, where offsets are unavailable, pay an air emissions mitigation fee to the air pollution control district or air quality management district based upon the actual emissions from the thermal powerplant, to the district for expenditure by the district pursuant to Chapter 9 (commencing with Section 44275) of Part 5 of Division 26 of the Health and Safety Code, to mitigate the emissions from the plant. To the extent consistent with federal law and regulation, any offsets required pursuant to this paragraph shall be based upon a 1:1 ratio, unless, after consultation with the applicable air pollution control district or air quality management district, the commission finds that a different ratio should be required.

(7) Nothing in this section shall affect the ability of an applicant that receives approval to install simple cycle thermal powerplants and related facilities as an amendment to a pending application to proceed with the original application for a combined cycle thermal powerplant or related facilities.

(f) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date except that the binding commitments in paragraph (5) of subdivision (e) shall remain in effect after that date.

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PROOF OF SERVICE

I, Ron O'Connor, declare that on June 7, 2004, I deposited copies of the attached *Applicant's Brief in Support of Recertification of the Simple Cycle Facility* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

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

Ron O'Connor

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03-AFC-2

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