

State of California

Energy Resources Conservation and Development Commission

In the Matter of:)
)
Application for Certification)
for the Orange Grove Energy Project)
_____)

Docket No. 08-AFC-4

**BRIEF IN RESPONSE TO DFI'S
APPEAL DENYING ITS MOTION TO
INTERVENE**

On December 18, 2008, DFI Funding filed a petition to intervene in the Orange Grove proceedings. During the December 19, 2008, evidentiary hearing the Committee denied the petition. On December 31, 2008, DFI Funding filed an appeal of this denial. Staff submits this brief in response to DFI Funding's appeal and in support of the Committee's denial of the petition.

INTRODUCTION

Staff concurs with the Committee's original denial of DFI's petition to intervene as well as the reasoning set forth in the applicant's opposition to DFI's petition for intervention dated December 19, 2008. As set out in the Prehearing Conference Order, dated November 6, 2008, the deadline to petition for intervention was December 1, 2008. Therefore, DFI's December 18, 2008 petition was untimely. In addition, it was filed the day before the evidentiary hearing, making it unreasonably late in the proceeding. Even though its petition was denied and the evidentiary hearing completed, DFI was nevertheless given ample opportunity to provide public comment regarding the project, which it did. Intervention at this point would serve no useful purpose in the case.

DFI claims it never received direct notice from the Commission regarding the Orange Grove power plant project. Although this claim is true, the Commission has no obligation to directly notify a business whose location is in Emeryville, California, hundreds of miles away from the project site. The Committee's denial of DFI's petition to intervene should be upheld. There is no compelling reason to overrule it.

1 Proof of Service (Revised 10/23/08 filed with original.
Mailed from Sacramento on 1-20-09 .

THE ENERGY COMMISSION HAD NO OBLIGATION TO NOTIFY DFI

Appendix B(a)(1)(E) to Title 20 of the California Code of Regulations sets out the information requirements a power plant application must provide to the Commission. In order to ensure land owners in the area are notified about a pending power plant application, an applicant, in an appendix to the application, must provide a list of current assessor's parcel numbers and owners' names and addresses for all parcels within 500 feet of the proposed transmission line and other linear facilities and for all parcels within 1000 feet of the proposed power plant and related facilities. It is undisputed in the record that applicant provided the required information.

California Code of Regulations, Title 20, section 1709.7 (a), requires the Commission to provide mailed notice of the first informational presentation to all owners of land adjacent to the proposed sites. It is undisputed that the assessor's parcel information provided by the applicant listed the owners of the land in which DFI claims to have an interest. Those owners are Prominence Partners and Tesla Gray. These parties were mailed notices as required by regulation. DFI is not an owner of record; the Commission had no reason to know about DFI or that DFI would be interested in participating in the process. More importantly, the Commission was under no obligation to affirmatively seek out all those who might have a lien on property surrounding the project site.

In *Horn v. County of Ventura*, 24 Cal.3d 605, (1979) the court reviewed the impact of insufficient notice on neighboring landowners of a subdivision. The court noted that whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to reasonable notice and an opportunity to be heard before the approval occurs. (24 Cal.3d 605, 616) Similarly, property owners near potential power plant sites are given reasonable notice and an opportunity to participate in the siting process.

In discussing what type of notice is acceptable, the *Horn* court refrained from describing a specific formula which detailed the nature, content, and timing of the requisite notice. The court did note that an acceptable technique might include notice by mail to the owners of record of property situated within a designated radius of the subject property, (24 Cal.3d 605, 618).

In this case, the owners of record within a designated area of the proposed site were Prominence Partners and Tesla Gray. DFI was not a listed owner and, therefore, not subject to notification requirements.

III

DFI HAD AMPLE OPPORTUNITY TO COMMENT

As with any member of the public, DFI was free to provide oral and written comments regarding the Orange Grove project. DFI utilized this opportunity by commenting, through its attorneys, during the hearing and by submitting a 16-page letter containing additional comments. The end result is that DFI informed the committee as to the concerns it had regarding impacts on certain parcels of lands from the construction of the Orange Grove project.

IV

CONCLUSION

For the reasons provided above as well as for the reasons put forth by the applicant in its opposition to DFI's petition for intervention, staff supports the Committee's original decision to deny DFI's petition for intervention and recommends that it be upheld.

Date: January 20, 2009

Respectfully submitted,

_____/s/_____

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