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March 2, 2007

DOCKET
01-AFC-7
DATE MAR 0 2 2007
RECD. MAR 0 2 2007

Docket Office
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

**Re: 01-AFC-7C – Applicant's Status Report #1**

Dear Docket Clerk,

Attached please find the Applicant's Status Report #1, submitted in response to the Committee's order of December 21, 2006.

Very truly yours,

Eric Janssen
Legal Assistant to Greggory L. Wheatland

Ellison, Schneider & Harris L.L.P.
Attorneys for Calpine Corporation

Cc: Hearing Officer Paul Kramer, Jr.
Commissioner Geesman, Presiding Member Siting Committee
Commissioner Byron, Associate Member Siting Committee
Ms. Jeri Zene Scott, Compliance Project Manager

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | |
| | ) | Docket No. 01 AFC 7C |
| PETITION TO AMEND THE COMMISSION | ) | |
| DOCKET NO. 01-AFC-7C | ) | |
| DECISION APPROVING THE APPLICATION | ) | |
| FOR CERTIFICATION FOR THE | ) | |
| RUSSELL CITY ENERGY CENTER | ) | |
| | ) | |

**APPLICANT'S STATUS REPORT #1**

The Russell City Energy Center LLC ("Applicant") submits this Status Report in response to the Committee's order of December 21, 2006.

**I. Status of the Proceeding**

The status of the proceeding is as follows:

(1) The Applicant has cooperated fully and in a timely manner with the Staff's investigation. The Applicant and Staff have been conferring weekly to review the status of the Staff's review. The Applicant has responded fully to all Staff Data Requests within the deadlines specified by Staff. As a result of this cooperation, the Staff has concluded its investigation of at least 16 of the 20 technical areas. For these areas, there are no disputed issues and the areas are "ready for publication."[1]

(2) The Bay Area Air Quality Management District (BAAQMD or District) is proceeding in a timely manner in its assessment of the air quality impacts of this project. The RCEC

[1] CEC Staff Status Report #1, February 27, 2007, p. 1.

Application to the BAAQMD was accepted as an Amendment and was deemed complete by the District on December 14, 2007. Following typical BAAQMD procedures, the PDOC will be issued on or before April 2, 2007 and the FDOC will be issued (following a 30 day public comment period) on or before June 1, 2007.

(3) On February 1, 2007, the Alameda County Local Area Formation Commission (LAFCO) approved the Mt. Eden Reorganization (Phase 1) Annexation of Territory to the City of Hayward and Corresponding Detachments from the Alameda County Library District and the Alameda County Fire Department. The approved annexation includes the unincorporated "islands" of territory known as the Depot Road Island where the northern portion of the proposed RCEC is located.

In short, the proceeding has moved forward in a timely manner. At least 16 of 20 technical areas are "ready for publication" at this time. The Applicant submits that the Staff Assessment should be issued promptly for all technical areas that are "ready for publication."

## II Technical Areas Ready For Publication

The Staff's Status Report #1 identifies 16 technical areas that the Staff has determined "have no issues and are ready for publication."[2] Because the Staff has completed its analysis of these subject areas, because the areas have no unresolved issues and because these issues are "ready for publication" the Applicant respectfully submits that the Staff promptly publish its Assessment on these 16 issues. Following publication of these issues, the Applicant recommends that there be an opportunity for a Staff Assessment Workshop, if any party so requests. If no party requests a Workshop, then the Workshop need not be scheduled. The

[2] *Id.*

Applicant recommends that Agency comments on these issues be requested fifteen days after issuance of this Assessment, consistent with the time period provided in the current Committee schedule. The Applicant's proposed schedule is discussed further in Section IV below.

## III. Technical Areas That May Have Unresolved Issues

The Staff has listed four technical areas that it believes still have "issues". Except for Air Quality, it is not clear whether Staff believes that these other issues are ready for publication or will be ready for publication soon. We address each of these areas below.

### A. Air Quality

The BAAQMD has informed the Staff and Applicant that it intends to issue a PDOC on or before April 2 and an FDOC on or before June 1. This is not a change in the District's planned procedures for processing the Amendment to the RCEC FDOC. In a prefiling meeting with the CEC Staff on November 9, 2007 (this Amendment was filed on November 17) the Applicant explicitly discussed with the CEC Air Quality Staff that the District would prepare both a PDOC and a FDOC. Therefore, when the Staff proposed in its Issues Identification Report (IIR) to release its Staff Assessment on February 23, 2007, it knew or should have known that the FDOC would be released after February 23. Moreover, even if the Staff did not understand the District's schedule when it issued its IIR, the Staff had further opportunity to clarify its understanding with Mr. Weyman Lee (the District's Senior Air Quality Engineer who will be reviewing the RCEC Application at the District) when he attended the informational hearing and site visit on December 15, 2006.

The Applicant respectfully submits that the Staff should issue its Assessment of Air Quality issues after issuance of the PDOC. The PDOC for the Amended project will be very similar to the FDOC for the current project. Moreover, based on our extensive experience with

the BAAQMD, there is a very low probability that there will be any significant changes between the PDOC to be issued on or before April 2 and FDOC to be issued on or before June 1.

If the Staff issues its Assessment of Air Quality issues after release of the PDOC, two important purposes are served. First, if the Staff has any questions or concerns about the PDOC, the public interest is served by the Staff making these concerns known to the District and to the public after the PDOC is issued so that these concerns may be taken into consideration by the District in its preparation of the FDOC. Second, if the FDOC does not require any changes to the PDOC, the Staff Analysis is complete and this proceeding may move forward more promptly. In the unlikely event that there are any changes between the PDOC and FDOC, the schedule should allow the Staff an opportunity to supplement its air analysis (as provided in the current Committee schedule.)

**B. Land Use**

Under the category of Land Use, the Staff raises issues regarding thermal plumes, zoning and traffic impacts. The Applicant submits that while these issues represent matters that may be points of disagreement between the Applicant and Staff (issues that we are hopeful will be resolved), these are not reasons to delay issuance of the Staff Assessment on Land Use.

**1. Thermal Plumes**

The Staff states that (1) the Applicant is required to submit a Form 7460-1 to the Federal Aviation Administration (FAA), (2) the FAA must review the form and (3) the Alameda Airport Land Use Commission (AALUC) must receive the FAA response to the Form 7460-1 before the AALUC makes its determination regarding the compatibility of the new proposed location with airport land use plans.[3]

[3] *Id.* at 2.

These statements by Staff are premised on a misreading of Applicable LORS. First, the Staff assumes that potential thermal plumes from the RCEC require the filing of a Form 7460-1. This is incorrect. According to the FAA, the Form applies only to solid structures. Because the RCEC does not penetrate the airport's horizontal surface or any of the approach surfaces, RCEC does not qualify under the 14 CFR Part 77.13 rules as a project that is a potential obstruction to air navigation and the FAA form is therefore not required.

Second, the staff assumes that the AALUC makes determinations of compatibility for specific projects.[4] This is also incorrect. According to the AALUC, it has no review authority over individual projects.

The Applicant will shortly submit a memorandum that addresses this issue with citation to applicable LORS and with records of conversation with the relevant agencies. However, it is not necessary to determine at this time whether the Staff's interpretation of FAA LORS is correct.

The significant point here is that the Staff should publish its interpretation in the Staff Assessment so that the Applicant and other interested agencies may formally respond. That is the normal process in Commission proceedings. The very purpose of the Staff Assessment is to place issues on the record for discussion and resolution. There is no basis for delaying issuance of the Staff Assessment on this issue.

2. **Zoning**

The Staff states that the City of Hayward would be required to issue the project owner an amended or new resolution for RCEC which has not occurred.

To the Applicant's knowledge, the City has not indicated that it agrees with the Staff's

[4] *Id.*

interpretation of City LORS. The City Council has expressly endorsed this Project and has endorsed moving forward with the Amendment.[5] In any event, where the Staff believes that further input is required by a local agency, Staff should publish its interpretation in the Staff Assessment and allow the City to respond as appropriate. As noted above, that is the normal process in Commission proceedings. There is no basis for delaying issuance of the Staff Assessment on this issue.

### 3. Alternative parking sites

The Staff states that cumulative traffic impacts *may* require relocation of offsite parking for workers during construction "but no alternative sites have been identified by the project owner."[6] No alternatives have been offered by the Applicant because the Staff has not heretofore shared with the Applicant the reasons why it believes relocation may be required, nor has the Staff requested that the Applicant provide alternative locations. At this time the Staff should publish its Assessment of the issue. Then the Applicant can review the Assessment and either propose alternative sites or offer information why such sites are not required. Once again, there is no basis for delaying issuance of the Staff Assessment on this issue.

## C. Traffic and Transportation

The Staff correctly notes that it issued a supplemental data request on February 5, 2007 and requested a response by March 5, 2007. The Applicant submitted its response on March 2, 2007. With this response, the Staff should have all of the information it needs to promptly issue its Assessment on this technical area.

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[5] Informational Hearing, December 15, 2006, Tr. Page 6
[6] CEC Staff Status Report #1, February 27, 2007, p. 2

### D. Waste Management

The Staff states that "Both the Energy Commission and DTSC [Department of Toxic Substances Control] recognize that there are deficiencies in the potential level of contamination on the parcels for the proposed new location."[7] To date, the Staff has not identified these alleged deficiencies to the Applicant. That is the purpose of the Staff Assessment.

Staff correctly notes that DTSC has provided Commission staff and the project owner with a draft copy of their comments and that we are in the process of responding to these comments. We expect that the DTSC will finalize its comments very soon. The Applicant expects to respond by March 9, 2007.

The Staff also states that Staff is working with the Regional Water Quality Control Board (Water Board) and the DTSC to understand which agency will be the administering agency. In a telephone conference call on February 27, 2007, between the Staff, Applicant, Water Board and DTSC, it was mutually agreed that the City of Hayward Fire Department is the preferred administering agency. The Applicant will ask the Hayward Fire Department to accept this role.

With the Applicant's response to the DTSC to be filed by March 9, 2007 and the Hayward Fire Department's agreement to be the administering agency, the Staff will have all of the information necessary to complete the Staff Assessment on this technical area.

## IV. Schedule

As an Alternative to the Staff's proposed schedule, the Applicant proposes the schedule set forth below.

(1) The Applicant recommends that the Staff promptly issue its Assessment on all

[7] *Id.* at 3.

technical areas that are "ready for publication" and that the Committee process these technical areas into the record, without awaiting the Staff Assessment on Air Quality. The uncontested technical areas represent 80% or more of the technical areas. If these technical areas are processed now by the Committee, the Committee can begin preparation of substantial portions of the Proposed Decision without awaiting the issuance of the FDOC. Then, once the FDOC is issued, the only remaining issue will be Air Quality and this issued can be addressed much more quickly if it is the only outstanding issue to be resolved.

The Staff Schedule proposes to delay issuance of the Assessment on Phase I technical areas until March 30, 2007. This is more than 5 weeks after the date previously proposed by Staff. Because most technical areas are ready for publication, there should be no reason why the Staff Assessment on all technical areas except for Air Quality cannot be issued by March 15.

(2) In its revised schedule, the Staff proposes that its Assessment on Air Quality be filed after issuance of the FDOC. The Applicant recommends that the Staff Assessment on Air Quality be issued during the 30 day public comment period following issuance of the PDOC, so that the BAAQMD and the public may be informed of any concerns or questions that the Staff may have with the PDOC. If the District is informed of the Staff's concerns in a timely manner, the District can address these concerns in the FDOC. In most cases, there are few if any substantive differences between the PDOC and the FDOC. In the unlikely event that the FDOC is different from the PDOC, the Staff should be permitted to supplement its Assessment on Air Quality after issuance of the FDOC.

There is clear precedent for a schedule that requires the Staff to file its Assessment after the District's preliminary determination but before the District's final determination. As shown below (emphasis added), the suggested 6-month schedule published by the Siting Division

provides for exactly this sequence of PDOC – Staff Assessment – FDOC – Addendum (or Errata) to Staff Assessment.

## 6-Month Energy Facility Licensing Process[8]

## Example 6-Month Schedule

| Activity | Day |
|---|---|
| Applicant files Application for Certification (AFC) | -45 |
| Executive Director's recommendation on data adequacy | -15 |
| Decision on data adequacy at the business meeting | 0 |
| Staff files data requests | 10 |
| Staff files Issue Identification Report | 35 |
| Applicant provides data responses | 40 |
| Information hearing and site visit | 45 |
| Data response and issue resolution workshop | 50 |
| **Local, state and federal agency draft determinations** | **60** |
| **Staff Assessment filed** | **75** |
| **Staff Assessment workshop** | **85** |
| **Local, state and federal agency final determinations** | **100** |
| **Addendum to Staff Assessment filed** | **120** |
| Evidentiary hearings | 130 |
| Committee files Proposed Decision (20 days after hearing) | 150 |
| Hearing on the Proposed Decision | 160 |
| Close of Public Comments on the Proposed Decision (15 days after the filing of the Proposed Decision) | 165 |
| Commission Decision | 180 |

(3) Under the Committee's adopted schedule, there is a 14 day period for agency comments on the Staff Assessment and a 21 day period after receipt of comments for the Staff to issue its errata. Under the Staff's proposed revisions to the Schedule, there is a 30 period for agency comment on the Assessment and a 115 day period after receipt of comments for Staff to issue its errata. Assuming that evidentiary hearings cannot be held until after the errata is filed, the Staff's schedule would push a final decision on this Amendment into the fall.

[8] http://www.energy.ca.gov/sitingcases/6-MONTH_12-MONTH_SPPE_PROCESS.PDF

The Applicant's schedule would preserve the same time periods for agency comment and preparation of the errata and would allow the Committee to conduct evidentiary hearings on all technical areas except Air Quality this spring, rather than next fall.

(4) The schedule originally proposed by the Staff in this proceeding targeted a final Commission decision on this Amendment by June 11, 2007. As the Applicant explained at the Informational Hearing a decision by the Commission in June 2007 is a critical milestone in achieving commercial operation by June 2010. A timely decision by the Commission on the Amendment is necessary for the RCEC project to obtain financing and for PG&E to apply for a CPCN at the California Public Utilities Commission.

The Applicant has cooperated fully with the Staff and has responded to all Staff requests in a timely manner. Most technical areas have no disputed issues and are ready for publication. The Air District will issue its PDOC on or before April 2, 2007. Given these facts, there is simply no justification for the lengthy delays proposed by the Staff in its revised schedule. The Applicant urges the Committee to adopt the schedule set forth below.

March 2, 2007

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

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*Applicant's Proposed Schedule*

| Activity | Day | Date |
|---|---|---|
| Petition filed by project owner | 0 | Nov 17, 2006 |
| Committee assigned to oversee petition process | 0 | Nov 17, 2006 |
| Staff files Issues Identification Report | 24 | Dec 11, 2006 |
| Committee holds information hearing and site visit | 28 | Dec 15, 2006 |
| Staff files data requests | 33 | Dec 20, 2006 |
| Project owner provides data responses | 59 | Jan 15, 2007 |
| Local, state, and federal agency preliminary determinations and comments from all agencies except BAAQMD | 61 | Jan 17, 2007 |
| Possible Staff data response workshop (Not Required) | 66 | Jan 22, 2007 |
| **Staff Assessment Part I filed on all issues except air quality** | **118** | **Mar 15, 2007** |
| **BAAQMD issues PDOC** | **135** | **Apr 2, 2007** |
| **Agency comment due on Staff Assessment Part 1** | **135** | **Apr 2, 2007** [9] |
| **Staff issues Errata on Part 1 issues** | **156** | **Apr 23, 2007** [10] |
| **Staff Assessment Workshop on Part 1 and Discussion of PDOC** | **158** | **Apr 24, 2007** |
| **Staff issues Assessment on Air Quality** | **163** | **Apr 30, 2007** [11] |
| **Prehearing Conference on Part 1** | | **May TBD** [12] |
| **Evidentiary Hearing on Part 1 (if necessary)** | | **May TBD** |
| **BAAQMD Issues FDOC (tentative)** | | **May 16 -Jun 01, 2007** |
| **Staff issues errata to Air Quality Assessment 15 days after Issuance of FDOC (if necessary)** | | **Jun 1 -15, 2007** [13] |
| **Evidentiary hearing on Air Quality (if necessary)** | | **Jun TBD** |
| **Committee files Proposed Decision on Amendment** | | **TBD** |
| **Commission decision** | | **TBD** |

[9] 14 days after SA filed, per Committee Schedule for the RCEC Amendment.
[10] 21 days after agency comment deadline per Committee Schedule.
[11] On the last day of the 30 day public comment period on the PDOC.
[12] 14+ days following filing of errata per Committee Schedule
[13] 15 days after issuance of the FDOC